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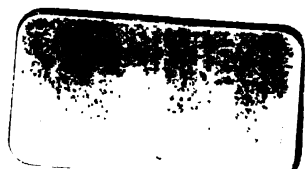
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A
GENERAL ABRIDGMENT
OF
Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

BY CHARLES VINER, Esq.
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY
OF OXFORD.

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See tit. Copyhold and tit. Manor.

[1. **T**HERE is a customary court, *consisting of copyholders, or customary-holders, for without them it cannot be, and this court may be held without any free tenant, or other suitors, besides the copyholders or customaryholders, and of this court the lord or steward is judge.* Co. Lit. 58.]

(A. a) The Tourn of the Sheriff.

[1. **T**HE sheriff's tourn is incident to the office of sheriff. *The tourn is the king's court and of record.* 2 Inst. 143. Co. 4. Mitton 33. b.]

2. *By Magna Charta 9 H. 3. cap. 35. The sheriff shall keep his tourn at the usual place, and that only twice a year, in the due and customed place, viz. once after Easter, and once after Michaelmas.*

3. *Westm. 2. 13 E. 1. cap. 13. The sheriffs in their tourns, and elsewhere, when they have to inquire of malefactors, by the precept of the king, or of their office, shall make their inquest by lawful men, at least 12, who shall set their seals to their inquisitions, and the sheriffs shall take and imprison those whom by such inquisitions they shall find guilty, as they have used to do; and if they shall imprison others, such persons imprisoned shall have their action by writ of imprisonment against the sheriff, as against any other person. And so it shall be observed of every bailiff of liberty.*

4. *1 E. 3. cap. 17. Sheriffs and bailiffs of franchises, and all others who take indictments in their tourns, or elsewhere, shall take such indictments by roll indented, whereof one part shall abide with the indictors, so that one of the inquest may shew one part of the indenture to the justice, when he shall come to make deliverance.*

5. *Indictment was in the sheriff's tourn four days after the month of Easter, and it was very much debated, whether the indictment was void or not, because the statute says, that he shall lose his tourn. Br. Indictment, pl. 27. cites 6 H. 7. 2.*

Note, that by award, an indictment taken in the sheriff's tourn

after the month of St. Michael is void; because the statute is, that it shall be held within a month after Easter, and after Michaelmas, otherwise he shall lose his tourn, and consequently, if there is no tourn, then the indictment taken after before the sheriff in no tourn is void. Br. Indictment, pl. 9. cites 38 H. 6, 7.

[2]

6. The sheriff's tourn wherein the sheriff had the directory; was in the meeting of the freemen in several parts of the county; and this was anciently, and now is called by that name, which, simply considered, is but a hundred court, or the sheriff's tourn to keep the hundred court. It was ordered to be kept twice every year, viz. at Lady-day and Michaelmas, or soon after; unto this court all the freeholders of the hundred repaired, and there they, the bishop and sheriff, executed the same power and work for kind as they did in the county court. In this court all the suits in the hundred court depending had their determination, and others had their commencement and proceedings, as well the pleas of the crown as others. Some have conceived it to be a county court, or superior thereto, but there being no ground thereof, I conceive it to be no other than a visitation of the county by parcels or in circuit. Bacon of Government 66, 67. cap. 24.

(B. a) [Tourn.] Who shall be bound to come to it.

Fitz. Leet,
pl. 1. cites
S. C. that a
man shall
not be
bound to come to two leets by reason of his reſiance.

[1. IF a man hath a leet of all the reſiants within the precinct of his manor which is within the hundred, yet these tenants shall be bound to come to the sheriff's tourn. 18 H. 6. 13.]

Before the
making of
this statute,
the sheriff
in his tourn,
and the
lords of
leets, did use

2. Stat. Marl. 52 H. 3. cap. 10. For the tourns of sheriffs it is provided that archbishops, bishops, abbots, priors, earls, barons, nor any religious men or women, shall not need to come thither, except their appearance be required thereat for some other cause;

to amerce archbishops, bishops, priors, earls, barons, religious men and women, if they came not to the tourns, or to the leets of others, because for suit real no distress can be taken, but for the amercements for default of suit, which this act doth remedy: for now, seeing it is hereby provided, that the persons above-named shall not need to come to tourns, &c. therefore for their not coming they cannot be amerced. 2 Inst. 120, 121.

And it is
worthy of
observati-
on, that by

3. Par. 2. But the tourn shall be kept as it hath been used in the times of the king's noble progenitors.

the common law, parsons of churches, that had curam animarum, the better to perform their function, were not compellible to come to tourns or leets, and if they were distrained to come thither, they might have a writ, Cum secundum consuetudinem regni nostri personæ ecclesiasticæ ratione terrarum & tenementorum suorum ecclesiis suis annexorum ad veniend' ad visum franc' pleg' in cur. nostra, vel aliorum quorumcunque, &c. whereby it appeareth that this writ is grounded upon the common law, being the general custom of the realm; but other clerks (that be no parsons of churches with cure) under which name all ecclesiastical persons, regular and secular, are contained, if they be distrained to come to tourn or leet, they shall have a writ reciting this statute to be discharged thereof, which writ beginneth, Cum de communi consilio provisum sit quod viri religiosi non habeant necesse venire ad tournum vicecom' &c. 2 Inst. 121.

This tourn of the sheriff is curia vicecom' francii plegii, (as it hath been said) and therefore this act extendeth to all leets and views of frank-pledge of all other lords and persons. 2 Inst. 121.

Court.

2

4. Par. 3. *And they that have hundreds of their own to be kept, shall not be bound to appear at any such tourns, but in the bailiwicks where they be dwelling.*

Here hundredum is taken pro visu franci plegii, so

as the sense is, that he which hath tenements in the tourn, and in some other view of frank-pledge of some other lord, or in diverse views of frank-pledge, he shall not need to come to any other but where he is conversant, and hundreds here are named, because sheriffs (as hath been said) kept their tourns in every hundred. 2 Inst. 122.

5. Par. 4. *And the tourn shall be kept after the form of the great charter, and as they were used in the times of King Richard and King John.*

Here haliva is taken for the tourn or leet

where he is conversant; 2 Inst. 122.

6. *Tenant in ancient demesne shall not be bound to come to the leet or tourn of the sheriff.* Br. Leet, pl. 38. cites the Register. [3]
But Brooke says, Quære of Leet.

(C. a) The Jurisdiction of the Tourn. In respect of the Thing.

[1. **N**OTHING shall be enquired before the sheriff in his tourn, but *actions popular, affray, blood spilt.* 4 H. 6. 10.]

Br. Presentment in Courts, pl. 7. cites S. C.

& S. P. by Martin. — Fitzh. Tourn de Viscount, pl. 1. cites S. C.

[2. *As an assault made upon a man, is not inquirable there, because it is but a tort to a particular person, of which trespass lies.* 4 H. 6. 10.]

Br. Presentment in Courts, pl. 7. cites S. C. & S. P. by

Martin — Br. Leet, pl. 15. cites S. C. & S. P. by Martin, and yet he agrees to the contrary of assrays, and therefore Brooke says, quære of assaults; for the law seems the same of the one as of the other. — Fitzh. Tourn de, &c. pl. 1. cites S. C. — Br. Presentment in Courts, pl. 17. cites 8 E. 4. 5. that the sheriff cannot inquire of assault in his tourn, and if he may inquire of it, the defendant shall not have answer, but shall make fine, &c.

[3. *The stoppage of a water which is to the nuisance of all the people of the country, may be enquired of there, for this is popular.* 4 H. 6. 10.]

Common nuisances done to a number of people are

inquirable in the tourn. Br. Leet, pl. 15. cites S. C. — Br. Presentments in Courts, pl. 7. cites S. C. & S. P. by Martin. — Fitzh. Tourn de, &c. pl. 1. cites S. C.

[4. *So of a bridge, over which the people ought to pass.* 4 H. 6. 10.]

Fol. 843.

Br. Presentments in Courts, pl. 7. cites S. C. & S. P. by Martin. — Fitzh. Tourn de, &c. pl. 1. cites S. C.

[5. *He may enquire of the death of a man before him and the coroner.* Statute of Marlbridge, cap. 24.]

B 2

[6. He

Fitzh. Leet pl. 1. cites S. C. accordingly. [6. He hath not conuifance of *bread and drink* in a tourn. 18 H. 6. 13. b.]

It fhall be prefented in a leet, but not in a tourn; per cur. for the fheriff's tourn is no leet, and fuch things as are omitted in a leet fhall be prefented in the tourn. F. N. B. 160. (A) in the new notes there, (d) cites 18 H. 6. 13. 13.—Br. Leet. pl. 25. cites 4 E. 4. 31. Contra, and that the fheriff may enquire in his tourn of bread and drink, and cites Prefentments in Courts, pl. 16. which is S. C. but S. P. does not appear there; but S. P. is in the year book accordingly. Mich. 4 E. 4. 31. b. pl. 13. by Choke.——a Infl. 7a. cites S. C. and fays, that for want of the knowledge of antiquity, it was obiter there denied, that the tourn and the leet was of one jurifdiction, and as fo an inflance given, that the leet has conuifance of bread and ale, viz. of the affife thereof, and that the tourn has not, it is clear that the breach of the affife of bread and ale is prefentable in the tourn as a common nufance, and therewith agrees conftant and continual experience, and reafon proves, that the derivative cannot have conuifance of that which the primitive had not, unlefs given by fome act of parliament; herewith agrees the file of the tourn, and the authority of later books, and cites 4 E. 4. 31. 22 E. 4. 22. 12 H. 7. 18. 28 H. 8. Dier. 13. b.

[7. But vide Statutum Walliæ, in Magna Charta, fol. 6. That the fheriff may enquire *de affifa panis & cervifiæ non obfervata, & de eam infringentibus.*]

[4] [8. If the fheriff finds in his tourn, that a man hath *encroached upon the king's highway*, he hath power to abate it. 29 E. 3. 21. b.]

As if *insufficient taxing of leather* or fuch like, for which a penalty is given by the ftatute, be prefented in the fheriff's tourn, it is void and coram non judice, and the party fhall not be put to answer, quod nota. Ibid.——Br. Prefentments in Courts, pl. 30. cites S. C.——Br. Jurifdiction, pl. 98. cites S. C.

10. Of *nufances, &c.* which are by the common law, the fheriff may inquire in his tourn. Br. Jurifdiction, pl. 98. cites 1 R. 3. 1.

11. In writ of *trespass, &c.* the defendant pleads, that his *franktenement*, or the like, where *franktenement* fhall come in debate in county, there the matter fhall proceed. Br. Jurifdiction, pl. 98. cites the register.

12. But contra if it come in iffue there upon plaint without writ, there it fuffices to remove the plea. Ibid.

a Hawk. pl. C. 57. cap. 10. S. 14. fays, it is certain, that the ftatute of Magna Charta, cap. 17. doth neither reftrein the fheriff's tourn nor the court leet from taking indictments or prefentments, or awarding procefs thereon, in the fame manner as before. But this power of awarding fuch procefs, having been abufed by the fheriffs in the tourns, was taken from all of them, (except thofe of London) but not from any court leet, by 1 E. 4. cap. 2.

13. The authority of the fheriff to hear and determine theft or other felonies by the common law, (except the death of a man) in the tourn, is wholly taken away by this ftatute of Magna Charta, cap. 17. howbeit, his power to take indictments of felonies and other mifdeeds within his jurifdiction is not taken away by this act. 2 Infl. 32.

14. The tourn and leet are of one and the fame jurifdiction; for *derivativa potestas est ejusdem jurifdictionis cum primitiva*, 2 Infl. 71.

15. Both

Court.

4

15. Both ecclesiastical and civil causes were decided in the hundred, county, and sheriff's court, before the conquest; but *William the Conqueror ordered, that no ecclesiastical plea should be holden before a secular judge.* 2 Inst. 488.

16. *Tithes* were anciently determined in the sheriff's tourn. 2 Inst. 661. cites many books, &c. to prove it.

17. The sheriff in the tourn may take *recognizances* for keeping the peace. 4 Inst. 263, 264. cap. 54.

18. Any matters done at the sheriff's tourn which is within the leet's jurisdiction is not void, and *coram non judice*, but only an infringement of the franchise. 12 Mod. 180. Per Holt Ch. J. Hill. 9 W. & M. The King v. Hewson.

(D. a) [The Jurisdiction of the Tourn.] In respect of the Place.

[1. IF a thing be to be done within a franchise, where there is view of frankpledge, in which default of not repairing a causey, or other matter, and all other things within franchise, are presentable, the not repairing the causey, or other matter, is not presentable in the tourn of the sheriff, because it is out of his jurisdiction, being it is out of his jurisdiction, being in the franchise. 29 E. 3. 21. a. b. adjudged. 28 E. 3. 95. b.] [5]

[2. But if there be a default in the lord of the franchise, in not causing the causey to be amended, this may be presented in the sheriff's tourn, without any warrant by writ, for that the franchise was derived originally out of the tourn. * 10 H. 4. 4. † 28 E. 3. 95. b. M. 17 Ja. B. R. between † Loader and Samuel, per totam curiam, upon evidence at the bar. Contra ‖ 29 E. 3. 21.]

* Fitzh. Leet pl. 13. cites S. C. — S. C. cited Co. Litt. 168. b. — † Fitzh. Barre, pl. 289. S. C. ‡ Cro. J. 551. pl. 13. S. C. adjudged for the plaintiff in trespass of taking his beasts; for to entitle the tourn, this default in the leet ought to have been particularly pleaded, and shewn to the court. — Mo. 893. pl. 1257. Hill. 14 Jac. C. B. the S. C. but S. P. does not appear. — A thing not presented in the leet shall be presented in the tourn of the sheriff, and for default there, in B. R. when it comes into the country. Br. Leet, pl. 4. cites 41 E. 3. 26. — Br. Presentments in Courts, pl. 1. cites S. C. & S. P. by Belknap. — If a common nuisance, &c. done within the jurisdiction of the leet, be not presented in the leet, the sheriff in his tourn cannot enquire of it, for that which is within the precinct of the leet is exempt from the tourn, otherwise there might be a double charge; but in that case a writ may be directed to the sheriff to inquire thereof, &c. against the opinion of Fineux in 12 H. 7. if his opinion be not misreported; And by the book of 29 E. 3. this writ is not taken away by the statute of 28 E. 3. cap. 9. made the year before, which was then fresh in the judges memory. 4 Inst. 261.

‡ Fitzh. Avowry, pl. 247, cites S. C.

[3. But this may be presented in the sheriff's tourn by prescription, 29 E. 3. 21. without doubt.]

Fitzh. Avowry, pl. 247, cites S. C.

For more of the tourn of the sheriff, see 4 Inst. 259, 260. cap.

53.—Prynne's Animadv. on 4 Inst. 189, 190.—Preface to 9 Rep. 2. b.—And see 2 Hawk. Pl. C. 55. to 72. as to the following points; 1st, The original institution of the courts, 2dly, At what time, and in what place it must be holden,

B 3

3dly,

Court.

gely, What persons owe suit thereto. 4thly, What authority the sheriff (or his steward) hath as judge of it. 5thly, What kind of offences are inquirable in it. 6thly, Within what place such offences must arise. 7thly, By what jurors, and in what manner indictments in it ought to be found. 8thly, In what manner they are to be proceeded upon. 9thly, In what manner they are to be traversed and determined.

(D. a. 2) County Court.

See Tit.
Court (I)
pl. 3.

Hereby it
appears,
that this
court has
no jurisdiction
to hold

pleas of wounds and maiming, but those pleas must be determined in the king's higher courts, but of battery (without wounding or maiming) this act proves, that the county court has jurisdiction, 2 Inst. 312. ad finem.

If the plaintiff counts in trespass, &c. to the damage of 40s. and the jury finds the damages under 40s. yet the plaintiff shall have no judgment, though in truth the cause de jure did belong to the inferior court, 2 Inst. 312.

1. 6, E. 1. cap. 8. **E**NACTS, that sheriffs shall plead in Stat. Gloucester their counties pleas of trespasss, as they have been accustomed; but as touching wounds and maims a man shall have his writ as before.

2. *Plaint of replevin by the sheriff shall be before the sheriff in full county, and not out of the court; for the suitors are judges, and the sheriff is minister, and the process shall be awarded by the suitors, per Catesby, but Pigot contra; for if the taking be the day after the county, the sheriff may take plaint, and make replevin immediately, and otherwise it shall be mischief to stay till the county [court;] and by him and Brian this has been used throughout England for ever; and per Brian, plaint cannot be made in court baron, but sedens curia; and per Pigot, Withernam cannot be but in full county. Br. Plaint, pl. 21. cites 21 E. 4. 66.*

3. The government of the county in times of peace consisted much in the administration of justice, which was done in the publick meetings of the freeholders, and their meetings were either in one place, or in several parts of the county, in each of which the sheriffs had the managing of the acts done there. *The meeting of the freemen in one place was called Folkmote by the Saxons, (saving the judgment of the honourable reporter) Coke Inst. 2. p. 69. and of later times the county court, the work wherein was partly for consultation and direction concerning the ordering of the county for the safety and peace thereof, such as were redress of grievances, election of officers, prevention of dangers, &c. and partly it was judicial, in hearing and determining the common pleas of the county, the church affairs, and some trespasses done therein, but not matters criminal, for the bishop was judge therein together with the sheriff, and by the canon he was not to intermeddle in matters of blood; yet neither was the bishop's nor sheriff's work in that court, other than directory or declaratory, for the freemen were judges of the fact, and the other did but edocere jura populo; yet in special cases,*

Mirror, p.
147.

1. l. Canon.
Mirror, cap.
1. S. 15.

upon

Court.

upon petition, a commission issued forth from the king to certain judges of oyer to join with the others in the bearing and determining of such particular cases; but in case of injustice, or error, the party grieved had liberty of appeal to the king's justice. Nor did the common pleas originally commence in the county court, unless the parties dwelt in several liberties or hundreds in the same county, and in case any mistake were in the commencing of suits in that court, which ought not to be, upon complaint the king's writ reduced it to its proper place, and in this also the king's own court had no pre-eminence. In those ancient times this county was to be holden but twice a year by the constitution of King Edgar, but upon urgent emergencies oftner, and that either by the king's especial writ, or if the emergent occasions were sudden and important, by extraordinary summons of ringing the moot-bells. Unto this court all the freemen of the county assembled to learn the law, to administer justice, to provide remedy for publick inconvenience, and to do their fealty to the king before the bishop and sheriff upon oath, and in the work of administering justice, causes concerning the church must have the precedency, so as yet the canon law had not got any footing in England. Bacon of Government, 66, 67. cap. 25.

Mirror, cap. 5. S. 1.

Ll. Canut.
Ll. Edgar.

Council
Brit. p. 197.
Tit. 22.
Ll. Edw.
cap. 35.

Ll. Edw.
cap. 35.

Ll. Edw.
cap. 4.

4. The sheriff may hold plea by replevin by plaint of any value. 2 Inst. 312.

2 Inst. 139.
S. P.

5. So if the replevin be by writ, but this is in nature of a commission. 2 Inst. 312.

6. So by a justices the sheriff may hold plea of a debt of 1000 marks or of a trespass *vi et armis*, and the process is an attachment, not a *capias*, but is but in nature of a commission, and doth not enlarge the judicature of his court, for the words of the writ do not, nor can make the sheriff a judge of that court in that particular case, but the suitors must be the judges as at common law, which cannot be altered but by act of parliament. The plaintiff may remove this plea without cause shewed, but the defendant cannot without shewing of cause. 2 Inst. 312.

The justices does not enlarge the sheriff's jurisdiction to other actions, but only enables him to hold pleas of greater sums than by his ordi-

nary jurisdiction he can do; arg. and therefore the action being brought in the county court for tithes, it was insisted, that this is not *debitum ex contractu*, but *ex delicto* founded upon a statute, whereof the sheriff has no power to hold plea, and therefore prayed a prohibition; but the court said, that this was a very considerable case, and therefore directed a suggestion and declaration upon it, that the defendant might plead or demur, and so the case might come judicially before the court. Lev. 253. Mich. 20. Car. 2. B. R. Bishop v. Corbet.

7. If in the county court, or other inferior court, the plaintiff shall divide a debt of 20l. into several complaints under 40s. the defendant may plead the same to the jurisdiction of the court, or may have a prohibition to stay such indirect suit. 2 Inst. 312. in principio.

[7]
For more as to this Tit. see Prohibition (B) per totum.

8. In county courts the suitors are the judges. 2 Inst. 225.

Nor will a justices

make the sheriff a judge of that court, by virtue of the words in the statute of Gloucester, cap. 2. for that were to alter the jurisdiction and judicature of the court, whereof by common law the suitors are judges, which cannot be altered but by act of parliament. 2 Inst. 312. — 4 Inst. 266. cap. 55. S. P.

9. *Trespass quare vi et armis*; the defendant *insultum fecit* upon the plaintiff was brought in the county court, and judgment there given for the plaintiff; but it was reversed here upon a writ of false judgment, because the *county court, not being a court of record, cannot fine* the defendant, as he ought to be, if the cause go against him, because of the *vi et armis* in the declaration, but an action of *trespass without those words will lie* in the county court well enough. Mod. 215. pl. 2. Trin 28. Car. 2. C. B. Wing v. Jackson.

10. On a motion for an attachment against F. & al' for a riot, &c. at a meeting of the county of Essex, for the election of a coroner, the dispute arose on the sheriffs offering to adjourn it from C. to D. The gentlemen apprehended, as they were judges of the court, i. e. suitors, they might adjourn only, and that the sheriff could not. Ch. J. and two judges held that the *power of adjourning* on the occasion, on election of verderors, knights of the shire, &c. was in the sheriff, it was his court, and so called in acts of parliament, &c. But Eyre doubted, but admitted that the sheriff had power to appoint the meeting, yet when the court was assembled (it being no more than an assembly of people to exercise a jurisdiction) they made a necessary part, and the sheriff alone could not adjourn. Trin. 5 Geo. B. R. The King v. Fitz. But Eyre afterwards mutavit opinionem.

11. Besides the tenants of the king, which held per baroniam, and did suit and service at his own court, and the burghers, and tenants in ancient demesne, that did suit and service in their own court in person, (and in the king's court by proxy,) there was also a certain set of *freeholders*, that did suit and service at the county court; these were such as *anciently held of the lord of the county, and by the escheats of earldoms fell to the king or such as were granted out to hold of the king, but with particular reservation, to do suit and service before the king's bailiff*, because it was necessary the sheriff or bailiff of the king should have suitors at the county court, that the business there might be dispatched; these suitors are the *pares of county court*, and indeed the judges of it, as the pares were, the judges in every court baron, and therefore the sheriff or king's bailiff having a court before him, there must be pares or judges, and the sheriff himself is not a judge, and yet the stile of the court is, Curia prima comitat' E. C. milit' vic' com' præd' tent' apud B. &c. So it appears by that, that the court was the sheriff's by the old feudal constitutions, and yet the lord was not the judge, but the pares only; so that even in a justicies, which was a commission to the sheriff to hold plea of more than was allowed by the natural jurisdiction of a county court, the pares only were judges, and not the sheriff, because it was to hold plea in the same manner as they used to do in that court. According to the *constitution of Alfred, there were to be 12 at least of the pares curiæ of the county court, to give a verdict*; for if there were not 12 at least consenting in one and the same sentence, the plaintiff failed, and he could have no judgment of the pares curiæ, and this was the original of the duodecimvirale

Court.

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duodecimvirale iudicium in England. Gilb. Hist. Exch. 76, 77, 78. cap. 5.

(D. a. 3) Held. At what Time, and Place.

1. 9 H. 3. cap. 35. **C**OUNTY courts are to be held from month to month, or longer, if formerly so used. This is altered by the Statute 2 E. 6.

2. 11 H. 7. cap. 15. *Directs how complaints are to be entered, and the sheriff, &c. shall make a sufficient precept to the bailiff of the hundred to attach, summon, or warn the defendant to appear and answer the said complaints. Bailiff not doing his duty to forfeit 40s. Justice of peace may convict the sheriff of fraudulent practice.*

3. 3 E. 6. cap. 25. *They are to be held every month, and no otherwise.* By this act every county of England, concerning the time of keeping the county court, is governed by one and the same law, and there is to be accounted 28 days to the legal month in this case, and not according to the month of the kalendar. 1 Inst. 71.

4. 7 and 8 W. 3. cap. 25. *They are to be held at the usual place, and on a Wednesday.*

5. The hushings, in truth, is the county court of the city; per Holt. Ch. J. 12 Mod. 396. Pasch. 12 W. 3. in case of Freeman v. Bluet. S. P. and sheriff may grant replevins out of it by the Statute W. 2. per Holt Ch. J. 12 Mod. 320. Mich. 12. W. 3. in a note there.

For more of the county court, see Crompt. Jurisdiction of Courts, 231. to the end.—4 Inst. 266. cap. 55.—Prynne's Animadv. on 4 Inst. 189, 190.

(E. a) Court Baron.

[1. **T**HE court baron is the court of the lord of the manor. Co. 4. Mitton 33. b.]

[2. The suitors are judges, and the steward but as a register. 4 Inst. 268. 6 h. 4. Placito 3. Co. Lit. 58. Co. 4. Mitton 33. b.] cap. 57. S. P. although
the plea be holden by force of a writ of right.—The suitors are judges in county and court baron, as well in writ of right and justices, as in suits by plaint, and not the sheriff nor steward. Br. Judges, pl. 15. cites 39 H. 6. 5. per cur.

In court baron the suitors are judges, and in the leet the steward is judge; per Fineux and Keble. Br. Court Baron, pl. 9. cites 12 H. 7. 16.

A woman may be a free-sutor to the lord's courts, but though it be generally said, that the free-suitors are judges in those courts, it is intended of men only. 1 Inst. 119.

A court baron cannot be holden but before the suitors, and sometimes before the bailiff and suitors, as by writ. But by plaint it shall be before the suitors only, but in no case without the suitors; resolved per tot. cur. Cro. E. 792. pl. 35. Mich. 42 & 43 Eliz. C. B. in case of Pell v. Towers.—Noy. 20. S. C. & S. P.

A prescription to have a court baron before his steward is not good; for it ought to be coram señatoribus; per tot. cur. But peradventure he might have prescribed to have a court to be holden before his steward, but not a court baron. Cro. J. 582, pl. 2. Mich. 18 Jac. B. R. Armyn v. Appletoft.

The king cannot alter the jurisdiction or judicature of the court baron, county or hundred, which are courts at the common law, nor appoint new judges there, but he

[9]

may

may appoint new courts, and authorise new judges. 6 Rep. 11. b Pasch. 25 Eliz. B. R. Jentleman's Case. — On a writ of right or upon a justicies in an admeasurement of dower, &c. the suitors are judges, and not the lord or his bailiffs, or the sheriff, though the writ be directed to them, because the court baron is the lord's, as the county court is the sheriff's; by these writs the courts are not made courts of records, but are of the same nature as before; a writ of false judgment lies in such case, and so of a writ of error. 6 Rep. 11. b. 11. a Pasch. 25 Eliz. B. R. Jentleman's Case, cites 34 H. 6. 35. 39 H. 6. 5. a. 7 E. 4. 23. a. 6 E. 4. 3. b. 12 H. 7. 16. &c.

Its first institution was for the ease of the tenants, and for ending of debts and damages under 40s. at home, as it were at their own doors. 4 Inst. 268, cap. 57.

[3. In a court baron they cannot hold plea of debt or trespass, where the debt or damage amounts to 40s. Co. Lit. 118. Vide for this the statute of Gloucester, cap. 8.]

Br. Jurisdiction, pl. 145. cites 3 E. 4. 15. S. P.

[4. In a court baron they cannot hold plea of trespass vi & armis, Co. Lit. 118. because this court cannot impose a fine.]

[5. Vide Hengam Magna, cap. 3. de Jurisdictione Curie Baronis, fol. 9.]

But Brook says, it seems there that Trin. 37. H. 6. is the contrary of the attachment, per Ashton, Danby, Moyle, Davers, and Choke, but this is not reported in 37 H. 6.

6. Every manor has a court baron incident to it, and every man, as well of the manor, as a stranger, may be impleaded there in debt or trespass if they come within the manor, and process shall be as at common law, that is to say, summons, attachment, and distress, and such returns as are good at common law, are good there, and goods attached there shall be forfeited to the lord; and the same of issues returned there upon default of the parties. Per Billinge, Wangforde, and Needham. Br. Court Baron, pl. 1. cites 34 H. 6. 49.

Br. Court Baron, pl. 12. cites S. C. —

7. In admeasurement of pasture, and in every vicontiel, as in justicies, &c. to the sheriff, the suitors are judges, and not the sheriff; per Littleton, Choke, and Needham. Br. Judges, pl. 27. cites 7 E. 4. 23.

Br. Justicies pl. 3. cites S. C.

8. Court baron shall be held in one place certain; per Brian, Quere inde; for otherwise it is used. Br. Court Baron, pl. 8. cites 8 H. 7. 3.

Br. Process, pl. 184. cites S. C. that precept by parol in court baron is good without writing. — In a court baron the plaintiff must allege a prescription to distrain. Brownl. 36. Anon.

9. Precept by parol in a court baron to distrain for amercement, or the like, is good without writing; per cur. quod nota. Br. Court Baron, pl. 25. cites 16 H. 7. 14.

Br. N.C. pl. 7. cites S. C. —

10. A court baron is incident to a manor; and was said, arg. that therefore the lord of the manor cannot grant over the court baron, neither if he grants the manor can he reserve the court baron, because it is incident. Br. Incidents, pl. 34. cites 19 H. 8.

176. Trin. 13 Jac. Brown v. Goldsmith. S. P. — Het. 35. Mich. 13 & 14 Eliz. Anon S. P. and therefore it is not lost, though no court has been holden time out of mind. — S. F. by Croke J. Bull. 65. and cites the cases in Br.

11. Action was removed out of court baron, inasmuch as there were only four suitors. Br. Suits, pl. 17. cites the register.——*Brooke says*, Quære inde, for it seems that the plural number, viz. two, suffices, and * so it was said for law in the Star Chamber, in the time of H. 8. between *Brown J.* and *Lion* grocer of London. pl. 31. cites 32 H. 8.—If there is only one suitor that is no manor. Br. Manor, pl. 5. cites S. C.

A court baron cannot be held without two suitors. Br. 31. compare, &c.

12. The court baron must be holden on some part of that which is within the manor, for if it be holden out of the manor it is void, unless a lord being seised of two or three manors, hath usually, time out of mind, kept, at one of the manors courts for all the said manors, then by custom such courts are sufficient in law, albeit they be not holden within the several manors. And it is to be understood, that this court is of two natures; the first is by the common law, and is called a court baron, as some have said, for that it is the freeholder's or freeman's court; for barons in one sense signify freemen, and of that court the freeholders that be suitors are judges, and this may be kept from three weeks to three weeks; the second is a customary court, and that doth concern copyholders, and therein the lord or his steward is the judge. Now, as there can be no court baron without freeholders, so there cannot be this kind of customary court without copyholders or customaryholders. And as there may be a court baron of freeholders only without copyholders, and then is the steward the register, so there may be a customary court of copyholders only without freeholders, and then is the lord or his steward the judge. And when the court baron is of this double nature, the court roll containeth, as well matters appertaining to the customary court, as to the court baron. Co. Litt. 58. 2.

Court baron may be held in any place within the manor, but not without, and so of a leet in any place within the liberty or franchise, and though no court has been held in the manor time out of mind, yet by this it is not lost; for it is incident to the manor of common Right. Dal. 61. pl. 15. 6 Eliz. Anon. — Ow. 35. Anon. S. P. but seems

only a translation of Dal. — It may be held sometimes in one place, and sometimes in another; per Windham J. Cro. E. 39. Pasch. 27 Eliz. C. B. — A court for admitting copyholders, and where no pleas are holden, may be held out of the precincts of the manor. Arg. quod sui concessum per totam curiam, Le. 289. pl. 394. Trin. 26 Eliz. B. R. in Ld. Decres's case.

13. The court baron is not a court of record. 2 Inst. 143. 4 Inst. 268. cap. 57. S. and ibid. 311. P. — But

See pl. 18. in the note there.

14. The stile of the court is, Curia Baronis E. C. Militis Manerii sui predicti (having the manor's name written in the margin) tenet tunc die, &c. coram A. B. seneschallo ibidem. 4 Inst. 268. cap. 57.

15. Court barons were ordained to determine injuries, trespasses, debts, and other actions, where the debt or the damages are under 40s. and also, because the lords of the manors, and court barons, have given their tenants their lands and tenements before the statute of Westm. 3. to hold of them, and also because homagers of court ought to inquire in this court, that their lords shall not lose their services, customs, or duties. And also it was ordained to make their suits there, and so shew themselves obedient to their lords, and that nothing be done within the manor

to

It was said in this case at the bar, that the form of pleading in the book of entries is, that the court was

holden before the steward if the action be for debt or trespass for amercements, or such personal things; but if the action is brought for things real, then it is coram *señalatoribus*. Ibid. 69. The suitors are judges in real causes, but not in personal; per Shute J. Godb. 49. in pl. 60. Mich. 28 & 29 Eliz. B. R. Anon.

[11]

17. It is the common course throughout the realm, that the amercements in a court baron are assessed by the steward. Cro. E. 748. pl. 1. Pasch. 42 Eliz. B. R. Rowleston v. Alman.

Noy 20. S. C. and S. P. and that where the court baron by prescription

may hold pleas to the value of more than 40s. it is then a court of record; and if there be error it shall be redressed by a writ of error, and not by a writ of false judgment.

19. The court by custom may be held before the steward, as the court of Westminster; per cur. And per Vaughan it is held before the steward, though the suitors are judges. 2 Jo. 22, 23. C. B. Eure v. Wells.

20. Debt was brought for a fine set upon the defendant by the homage at the court baron, grounded upon a custom to make laws for regulating their common, and inflicting a penalty on such as did inclose at inconvenient times; and a wager of law was offered there, and judgment is there for the defendant; for of common right the homage has no right to impose a penalty for such private offences, but it is only by custom that they can do it; cites 5. Co. Chamberlain of London's Case. Mo. 276. Leon. 203. The case indeed is not well reported, but upon comparing the books together, it appears the wager of law was not admitted in that case. Per Holt Ch. J. 12. Mod. 614. Hill. 13. W. 3. in case of the city of London v. Wood, cites Co. Ent. 118.

21. A court baron consists of the lord, tenants, steward and bailiff, within the manor, and is sometimes called the copyholder's court, especially when it is for trial of titles of their lands, for taking and passing estates, surrenders, admittances, and grants: and herein the lord or his steward is judge, (as the custom of the place is) yet the court is sometimes called the freeholder's court, when the actions and proceedings are for trial under 40s. and is something like a county court, and the proceeding much the same, and was without doubt granted to the lord originally by the

Court.

11

~~The~~ king; but now most are by prescription, and are commonly held once in three weeks, and may be as often as the lord or steward thinks fit, who is supreme judge in law and equity, and is obliged to register all records of the court, and other proceedings between lord and tenant, and between tenant and tenant, and to be indifferent between them; and when such court is to be kept the lord or steward sends his warrant at six or more days notice, according to custom. Scroggs, of Courts 39.

22. When a court baron shall be held. See Court (G) pl. 5.

(F. a) [Court Baron.] What things it may do.

[1. IF a man recovers in a court baron, they *have not power to make execution to the plaintiff of the goods of the defendant, but they may distrain him, and retain the distrains till satisfaction.* † 4 H. 6. 17. ‡ b. 22 Aff. 72.

† Br. Court Baron, pl. 6 cites S. C. & S. P. per tot. cur. accordingly;

But Brooke says, quære of this matter; for it is usual to tax the sum by the suitors of the court assigned by the steward, and then to award a *levari facias*, which is in nature of a *fieri facias*; *but Brooke adds, quære if by custom, or by the common law?—Br. Court Baron, pl. 7. cites S. C. but Brooke says, where the use is to make *levari fac'* *this is good by custom*, as it seems to him, but then it *ought to be pleaded* accordingly, as it seems.

*[12]

† Br. Execution, pl. 80. cites S. C. accordingly, but Brooke says it seems, that where it is otherwise used it is well, as by *levari facias*.—Fitzh. Execution, pl. 110. cites S. C. by Thirne, and also cites 4 H. 6. accordingly.——Adjudged, that a bailiff of a court baron, upon judgment there given, and a *levari facias* awarded, cannot sell the goods, and so levy the monies, without special custom. Noy 17. Hill. 3 Jac. B. R. Trye v. Burgh.——Ibid. cites 4 H. 6. 17. and 38 E. 3. 3. that he may deliver the goods to the recoverer, and that the lord may sell a distrain taken for a fine.——You may add any thing to a court baron by prescription, as to sell goods taken in execution upon a judgment; per Walmisley. Noy 20. in case of Pell v. Towers.

[2. Upon a recovery of damages in a court of ancient demesne, upon a writ of right, if execution be granted, the bailiff of the court may take and sell the cattle of the defendant. 7. H. 4. 27.]

Br. Executions, pl. 26. cites S. C. & S. P. by Huls, and

that in such case he may take the beasts of the defendant in any land held of the manor, though it be frank-fee land, quod non fuit negatum.

[3. P. 6 E. 1. B. R. Rot. 8. per judicium curiæ, curia baronis non habet potestatem placitandi de aliqua transgressione in parco vel in chacea de feris bestis nisi, quis inveniat cum manu opere.]

[4. Hill. 7 E. 1. B. Rot. 13. juratores dicunt, quod Alicia, quæ fuit uxor Adæ post mortem Adæ finem fecit cum T. W. de quo præd' Ada tenet sua (*) tenementa per 22s. pro dote sua habenda, & postea, quia præd' Alicia dixit, quod prædict' T. W. injuste prædict' pecuniam ab ea extorsit, amerciavit ipsam in curia sua primo ad dimidiam marquam, and postmodum ad 10s. pro defamatione illa; upon which verdict judgment is given. Et quia prædict' T. W. non potuit nec debuit de jure in curia sua de aliqua defamatione placitare, nec aliquem pro ea amerciare, consideratum est, quod prædicta Alicia recuperet pecuniam prædict' sic extortam versus prædict' T. W. & T. W. in misericordia.]

Fol. 544.

5. It

S. P. Br.
Court Baron,
pl. 10.
cites 1 E. 4.
10.

5. It was admitted in a *replevin*, that upon recovery of 38s. ~~the~~ a court baron, the officer may deliver to the plaintiff the beasts of the defendant in execution. Br. Court Baron, pl. 5. cites 38 E. 3. 3.

6. Where a man makes fine in court of record, there in court baron, the party for such offence shall be amerced. Br. Court Baron, pl. 20. cites F. N. B. 73.

7. *Parol* was removed out of court baron because there was only four suitors. Br. Court Baron, pl. 20. cites the register, fol. 111. and F. N. B. fol. 239.

8. *Trespass vi & armis* does not lie in court baron, but there the party may have superedeas. Ibid.

9. If a man divides a debt of 20l. or the like, in a court baron, into several petit sums under 40s. of this the party may have superedeas; and it seems, that of this the defendant may wage his law by conscience, for there is no such contract, and action of damages above 40s. does not lie in a court baron. Br. Court Baron, pl. 20. cites F. N. B. 239.

10. In *trespass* in county, or court baron, if the defendant pleads his *franktenement*, or the like, or claims the plaintiff to be his villein, or the like, the court shall cease, and if they proceed writ of false judgment lies. Br. Court Baron, pl. 21.

Cro. E. 255.
pl. 13 Gomerfall v.
Ways, S. C.
adjudged,
and though
it was in the
king's manor
and court

11. In a court baron no goods can be forfeited for default of appearance upon the distress; for distress is only in nature of a pledge to be safely kept; and in court baron the process is distress infinite only, and not an attachment; per Cur. and cited 33 and 34 H. 6. And judgment accordingly. Yelv. 194. Mich. 8. Jac. B. R. Gomerfall v. Medgate.

baron, yet the beasts could not be sold.—Bulst. 52. Hewett v. Norborough, * 8. P. and seems to be S. C. and though this being the king's manor, it was urged, that this was not merely a court baron, but a court of record, and that it is curia domini regis manerii sui de Dunstable, yet all the judges contra Williams held the goods not forfeited, and the sale not good, and judgment was entered for the plaintiff.—2 Roll. Rep. 493. Hill. 22. Jac. B. R. in case of Tuberville v. Tipper, it was agreed, that the process in court baron is summons, attachment, and distress.

* [13]

(F. a. 2) Original of Hundreds, and Hundred Courts.

1. **C**OUNTIES were too great to meet upon every occasion, and every occasion too mean to put the whole county to that charge and trouble, and this induced subdivisions; the first whereof is that of the hundred, now, and also anciently so called, but as ancient (if not more) is the name Pagus; for the historian tells us, that the Germans, in the executing their laws, a hundred of the freemen joined with the chief lord per pagos vicofque, and in raising of forces a hundred were selected ex singulis pagis, which first were called centenarii, or hundredors, from their number, but used for a title of honour like the triarii. And as a 2d hereunto I shall add that testimony of the council at Berkhamstead, which speaking of the reduction of suits from the king's

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court ad pagi vel loci præpositum, in other places it's rendred to the governors of the hundred or borough; and at this day in Germany their country is divided into circuits centen or canton, and centengriecht, and the hundredere, they call centgraven or hundred-chiefs, whether for government in time of peace, or for command in time of war, the latter whereof the word wapentake doth not a little favour; amongst these one was, per eminentiam, called the centgrave or lord of the hundred, and thereunto elected by the freemen of that hundred, and unto whom they granted a stipend in the nature of a rent, called hundred-settena, together with the government of the same. The division of the county in this manner was done by the freemen of the county, who are the sole judges thereof, if Polydore's testimony may be admitted, and it may seem most likely, that they ruled their division at the first according to the multitude of the inhabitants, which did occasion the great inequality of the hundreds at this day. *The government of the hundred rested at the first upon the lord and the hundreders, but afterwards, by Alfred, they were found inconvenient, because of the multitude, and were reduced to the lord or his bailiff, and 12 of the hundred, and these 12 were to be sworn, neither to condemn the innocent, nor acquit the guilty. This was the hundred court which by the law was to be holden once every month, and it was a mixt court of common pleas, and crown pleas; for the Saxon laws order, that in it there should be done justice to thieves, and the trial in divers' cases in that court is by ordeal. Their common pleas were cases of a middle nature, as well concerning ecclesiastical persons and things, as secular, for the greater matters were by commission, or the king's writ removed. All freeholders were bound to present themselves hereat, and no sooner did the defendant appear, but he answered the matter charged against him, and judgment passed before the court adjourned, except in cases where immediate proof was not to be had, albeit it was holden unreasonable in those days to hold such hasty process, and therefore the archbishop of York prefers the ecclesiastical, or canonical way before this. Lastly, in their meeting, as well at the hundred county court, they retained their ancient way of coming armed. Bacon of Government, 68, 69. cap. 25.*

2. *In King Alfred's time the kingdom was in gross, and then divided into counties and hundreds, and all persons then came within one hundred or other, and then the king's relations had the government of them, and therefore they were called consanguinei, and so are the earls, lords lieutenants, &c. at this day; and then, when the office became troublesome, there were ordained vicecomites, which name remains to this day, and the others continue to be called consanguinei, but have no power in the county, having only the honorary name of earls, or comites of such or such a country, &c. And for the better government of these counties, the vicecomites had two courts, but out of those the king granted petty leets, and court barons, but the tourn of the sheriff had the superintendent power, they being derived out of*

[14]

of the sheriff's tourn, as in Dy. 13. And then, afterwards, the king granted away some hundreds in fee-simple, and some franchises, and the last excluded the king utterly, but the hundreds granted in fee were not wholly exempt. On this arose some confusion, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the *statute of 9 E. 2.* that sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the king and country, and that bailiffs and farmers of hundreds should be sufficient men. And at this time hundreds were grantable for years. Then came the *statute of 2 E. 3. cap. 4.* and 5. that sheriffs should continue but for one year, but this took not away the whole inconvenience, for the crown still granted away bailiwicks and hundreds for lives at rents on such excessive dear rates, that made them endeavour to make up their money by unlawful means, and thereon came the *statute of 2 E. 3. cap. 12.* and 14. *E. 3. cap. 9.* By the first it was enacted, that all hundreds and wapentakes granted by the king, shall be again annexed to the county, and not severed; and by the other statute, that all should be annexed, and the sheriff should have power to put in bailiffs, for which he will answer, and no more shall be granted for the future; and one reason of this was, because the king granted away hundreds, and abated not the sheriff's farm; Arg. 2 Show 98, 99. pl. 98. Pasch. 32 Car. 2. B. R. in case of Cade v. Ireland.

See Tit.
Hundred.

(G. a) The Hundred Court Jurisdiction.

Br. Cuf-
toms, pl. 28.
cites S. C.

[1.] In an hundred court they may swear 12 freemen to present a thing. 39 E. 3. 35. 6.]

[2. In an hundred court they cannot hold plea of debt or trespass where the debt or damages amount to 40s. Co. Lit. 118.]

[3. In an hundred court they cannot hold plea of a trespass *vi & armis*. Co. Lit. 118.]

Br. Cuf-
toms, pl. 28.
cites S. C.
but says it
was neither
denied nor
affirmed,
but that the custom may be allowable.

[4. By usage a man may be amerced for not bringing a porpoise, or other royal fish, that he finds in the parish, to the manor of the hundred, where he should have 12d. for his labour, though the lord of the hundred hath a property in the thing for which the amercement is. 39 E. 3. 35. b.]

[15] 5. Note, that for amercement in the hundred the lord may distrain the beasts of the offender throughout all the hundred, though they are not in the land of the party. Br. Court Baron, pl. 13. cites 2 H. 4. 24.

6. Hundred can not try issue by inquest; for the lord cannot compel his franktenants to swear. Br. Court Baron, pl. 23.

2 Inst. 149.
and ibid.
311. S. P.

7. This is no court of record, and the suitors are thereof judges; of the antiquity and jurisdiction hereof, vide Magna Charta, and as the

the leet was derived out of the tourn *for the ease of the people, so this court of the hundred, for the same cause, was derived out of the court of the county, and is a court baron in his nature.* 4 Inst. 267. cap. 56.

8. The *style* of this court is *Curia E. C. Militis Hundredi sui de B. in Com'. Buck tent'. &c. Coram A. B. Seneschallo ibidem.* 4 Inst. 267. cap. 56.

9. By the *statute of 14 E. 3. hundreds* (except such as then were of estates in fee) *are rejoined* (as to the bailiwick of the same) *to the counties*, and all grants made to the bailiwick of hundreds, since that statute, are void, and the making of the bailiffs thereof belong to the sheriff, for the better execution of justice, and of his office; and so it was resolved by the Lord Treasurer Lea, and all the barons of the exchequer, and so decreed in the Exchequer Chamber between Fortescue of Buckinghamshire, and the sheriff of the same tourn, 2 Car. the plaintiff having of late divers hundreds granted to him for life in the county of Bucks, reserving a rent, which the sheriff disallowed, and put in bailiffs of his own: and a commandment was given to the court by the attorney general, to avoid the like in other counties, for that they were against law, and belonging to the office of the sheriff, and were occasions of delays and hindrances of justice. See the statute of W. 2. cap. 36. against procurement of suits in this court. 4 Inst. 267. cap. 56.

10. In the hundred court the *suitors are the judges*, and not the lord, though the writs (when the proceedings are by writ) are directed to him, which is, because the court is his, and the profits belong to him, and he is to see justice done. 6 Rep. 17. Pasch. 25 Eliz. Gentleman's Case.

11. One sued in B. R. for costs given in the hundred court which was under 40s. and declared, that the court was held before the steward *secundum consuetudinem manerii prædicti*. Exception was taken, that the steward is not judge in such court, but the suitors; but per Cur. a *steward by a custom may be judge in a hundred court*, and that so it had been held; and here the plaintiff has declared upon the custom, the declaration being *secundum consuetudinem manerii*; and a man may sue here in B. R. for a sum under 40s. As if 10s. costs be given in any suit here, he may sue for them in B. R. Le. 316. pl. 444. Pasch. 30 Eliz. B. R. Anon.

12. It was argued by Mr. Holt, that the execution in the hundred court is by *distingas*, and not by *levari facias*, and divers books were cited to that purpose; *sed non allocatur*; for where the books speak of a *distingas*, it is intended of a *levari facias*, because a *distingas*, and so in infinitum, would be endless in an execution. 2 Lev. 81. Hill. 24 and 25 Car. 2. B. R. in case of Doc v. Parmiter.

distingas; but *levari* may be by custom; per Holt Ch. J. 7 Mod. 44. Trin. 1 Ann. B. R. Anon.—S. P. and generally all the hundred courts in England have such a custom; but the true common-law-process is a *distingas*. 7 Mod. 1. Pasch. 1 Ann. B. R. Anon.—1 Salk. 201. pl. 3. S. P. and seems to be in S. C.

3 Keb. 126. pl. 44. S. C. per cur. accordingly.

—Levari facias is not the proper process of a hundred court, but a

13. In trespass the defendant justified by *levari facias awarded* by the steward, and sealed by him in a hundred court held before the steward and suitors; per Cur. The sealing of process by the steward is * sufficient, but the court being said to be *Coram seneschallo & sectatoribus*, it is ill, and judgment for the plaintiff on demurrer; but *Coram sectatoribus per B. seneschallum* [had been well enough] 3 Keb. 117, pl. 29. Hill. 24 Car. 2. B. R. Doe v. Parmiter.

14. *Trespass for taking his horses*; the defendant justifies by virtue of a recovery in a hundred court before J. S. *seneschallum Domini Regis*, and that a *levari facias* issued out, and by virtue thereof he prout minister curiæ did seize the horses upon that execution. The plaintiff replies, and sets forth the statute of 14 E. 3. 9, and avers, that this hundred was not granted in fee at the time of making of that statute; and the question intended was, how far that statute should extend, and what hundreds should be annexed to the sheriffwick by that statute? Baldwin pro quer' agreed, that the king might have hundreds, and so might a subject, but then they must be such as were in the hands of a subject in fee at the time of the making of that statute. Atkins said, Lord Ch. J. Hale's opinion was, in this case, that it extends to such only as had been granted out since the statute 10 E. 1. But per tot. Cur. that cannot come in question here; for here being a court de facto, the plaintiff shall not in this action try the title of the owner, and it is all one as if there be a disseisor of a manor, and a recovery in that court baron, the officer may well justify executing the process; for he that is in possession is dominus pro tempore, and if they would try the title it might be by *quo warranto*, or action on the case; and for that reason they all gave judgment for the defendant. Freem. Rep. 204. pl. 207. Mich. 1675. Ward v. Bent.

For more of the hundred court, see Crompt. Jurisdiction of Courts, 231. to the end.—4 Inst. 267. cap. 56.—And see tit. Hundred.

(H. a) Piepowders.

[1. *TO every fair a court of piepowders belongs of Right* 17 E. 4. cap. 2.]

[2. Mirror de Justices, fol. 3. cap. 1. sect. 3. That from day to day the right of strangers, plaintiffs, in fairs and markets be hastened, as of dust, according to the law of merchants.]

[3. 17 Ed. 4. cap. 2. reciting, that divers persons coming to fairs be grievously vexed and troubled in the court of piepowders by feigned actions, and also by actions of debts, trespasses, feates, and contracts, made and committed out of the time of the said fair, or the jurisdiction of the same, contrary to equity and good consciences, &c. be it enacted, that no minister of any such court of piepowders shall

But notwithstanding such writs made by the plaintiff, the defendant may offer an issue to the con-

shall hold any plea, without oath made by plaintiff or his attorney, that the contract, or other facts contained in the declaration, were made within the fair, and within the time of the fair, and within the jurisdiction and bounds of the said fair. 1 R. 3. cap. 6.] trary. 17 E. 4. cap. 2. Par. 9. — This statute was made perpetual by the 1 R. 3. cap. 6.

4. The steward is judge of this court: for it is a court of record. Br. Jurisdiction, pl. 111. cites 6 E. 4. 3. 6 Rep. 12. a, cites S. C. according-ly, and 7 E. 4. 23. a. — Br. Error, pl. 162. cites 6 E. 4. 3. and 7 E. 4. 23. that of error in court of piepowders lies writ of error, and not of false judgment, which proves that it is a court of record, and this per Littleton, quod non negatur. — 4 Inst. 272. cap. 60.

5. This court is a court of record if it may hold plea of any sum over 40s. adjudged and affirmed in error. Jenk. 132. pl. 70. S. C. cited a Bull. 23.

6. In the court of piepowders the plaintiff or his attorney shall be examined by oath if the matter arises within the fair, and the defendant may plead that it arises in a foreign place. Br. Jurisdiction, pl. 119. cites 1 R. 3. cap. 6.

7. This court is * incident to every fair and market, as a court baron to a manor, and is † derived of two Latin words, as is apparent, and so called, because that for contracts and injuries done concerning the fair or market there shall be as speedy justice done for advancement of trade and traffick, as the dust can fall from the foot, the proceeding there being *de hora in horam*; and therefore Bracton saith, *Item propterea qui celerem debent habere justitiam, sicut sunt mercatores quibus exhibetur justitia pepoudrous, &c.* 4 Inst. 272. cap. 60. * It is incident, and one cannot grant the fair reserving this court, sic dictum fuit, arg. Br. Incidents, pl. 34. cites 19 H. 8. — Fin. Law, Bull. 55.

Svo. 15. cites S. C. — Brownl. 275. Trin. 13 Jac. Brown v. Goldsmith, S. P. — S. P. by Croke J.

† Jenk. 132. pl. 70. says it is called Curia Pedis Pulverizati, because of the confluence of people, who, by their motion, raise pulverem vel lutum.

8. And there may be a court of piepowders by custom without fair or market, and a market without an owner. 4 Inst. 272.

(I. a) Piepowders. What Action lies there; and for what.

[1. IF one slanders another, who trades in the market, in any thing which concerns his trade, the action lies in the court of piepowders, but the words ought to be spoke * in the market, and not before; but if the words do not concern any thing touching the market, the court hath not jurisdiction. Co. 10. 73. Hall v. Jones. * Cro. E. 773. pl. 2. Howell v. Johns, S. C. & S. P. — Mo. 624. pl. 854. S. C. & S. P. held ac-

cordingly. — S. C. cited Mo. 831. in pl. 116. — 4 Inst. 272. cap. 60. cites S. C. & S. P. adjudged — S. C. cited a Bull. 21. — An. action upon the case for slanderous words, brought in a court of piepowders, for words spoken long before the court was held, adjudged there for the plaintiff, and affirmed here in a writ of error, because the court was laid to be held by prescription. 4 Bull. 23. cites 8 Jac. White v. Snow.

2. No action lies upon a *contract made at a fair before*. D. 3. M. 133. 80. adjudged.]

3. An action of trespass *for an assault and battery*, was brought in a court of piepowders *for an assault done long before*, and well maintainable. 2 Bulst. 23. cites Hill. 33 Eliz. Chambers v. Pert.

4. Though it be the *king's court*, yet *debt on a penal law* shall not be brought there. But because they have power to hold pleas in actions of debt, and so had colour to hold plea, in such action a judgment given therein is not void, but voidable by error. Cro. E. 530, pl. 59. Mich. 38 & 39 Eliz. C. B. Wilkinfon v. Netherfol.

Mo. 623,
624, pl.
854. Hall
v. Jones. S.
C. & S. P.
and also it
may be by
E. 4. 8.

5. A piepowder court *may be as well to a market as a fair*, it *has no jurisdiction of any matter but what happens in the market the same day*. Cro. E. 773, 774, pl. 2. Mich. 42 & 43 Eliz. B. R. Howel v. Johns.

may be by custom of a city or place, where there is no fair or market at that time, and cites 13 E. 4. 8.

[18]

A court of piepowders, though it be incident to a fair, yet, by custom it may be in a market; and likewise may be by the custom of a city or place where there is no fair or market at the time, and therefore though in pleading the court was intitled, curia pedis pulverizati ratione mercati, &c. an exception thereto was disallowed, because the record said further, secundum consuetudinem civitatis. Mo. 623, 624, pl. 854. Falch. 48

6. The jurisdiction thereof consisteth in *four conclusions*.

1st. The contract or *cause of action* must be *in the same time* of the same fair or market, and not before in a former.

2^{dly}. It must be for some *matter concerning the same fair or market*, done, complained on, heard, and determined.

3^{dly}. It must be *within the precinct of that fair or market*.

4^{thly}. The plaintiff *must take an oath* according to the statute of 17 E. 4. 2. but that concludeth not the defendant. 4 Inst. 272.

[7. *And all this was resolved and adjudged in a writ of error, brought by Hall v. Jones, and the case was this; Jones being register of the Bishop of Gloucester, brought an action upon the case in the court of piepowders, belonging to the market in Gloucester, against Hall for these words, master Jones and his clerks have by colour of his office extorted and gotten 300l. per annum by unlawful means, for many years together, above their ordinary fees, for proving testaments, and granting administrations; and not guilty being pleaded, &c. it was tried and adjudged for the plaintiff; and divers errors were assigned, but the judgment was reversed for these errors following;]*

1st. That this court of piepowders being incident to the market, hath *no jurisdiction but of such things as concern the market*, and these slanderous words did in no sort concern the market; but if one slander the wares of any in the market, whereby he cannot make sale of them, an action doth lie in that court.

2^{dly}. It appeared in the record that the words were *spoken the day before the market*, and no action lieth in that court but for an injury within the jurisdiction of the court done, complained on, heard and determined on the same market day, the proceedings being *de hora in horam*, and within the precinct of the market. And herewith agreeth 3 Mar. Dier, 132. And it was resolved, that

that this court was incident as well to a market as to a fair. *Eliz. B. R. 4 Inst. 272.*

13 E. 4. 8. — *Cro. E. 773. pl. 2. Howell v. Johns, S. C. but says nothing of the secundum consuetudinem civitatis, and judgment was reversed. Mo. 831. pl. 116. cites S. C. by the name of Powell v. Jones, as adjudged that the action does not lie, unless the words were spoke in the market or fair. — S. C. cited Arg. 2 Bull. 21. that the judgment was reversed for the errors mentioned as above in 4 Inst. 272. — S. C. cited D. 13a. b. Marg. pl. 80. that judgment was reversed.*

8. *Contracts, batteries, and assaults* are determinable in a court of piepowders, but not actions of the case for words; for that these do not disturb the market; per Fleming Ch. J. 2 Bull. 24. Mich. 10 Jac. in case of *Goodson v. Duffil.*

It is only for matters of contracts, and for matters arising within the market, and by occasion of the market, as batteries or disturbances happening there. But if the words were by occasion in the same market, it might perhaps be otherwise. *Cro. E. 773. pl. 2. Mich. 42 & 43 Eliz. B. R. Howell v. Jones.*

(K. a) [A Court of Piepowders.] Of what Things and Actions it may hold Plea.

Fol. 545.

[1. **V**IDE Mirror de Justices 16. b. cap. 1. sect. 15. of what actions they shall hold plea.]

[2. A court of piepowders belonging to a fair cannot hold plea of obligations, for this is ordained for things arising in the fair. Mich. 10 Jac. B. R. between *Goodson and Duffield* per Curiam.]

3. There may be a court of piepowders by prescription without a fair or market, that may hold plea of obligation by prescription. Mich. 10 Jac. B. R. between *Goodson and Duffield*, resolved per Curiam.]

[19]
Where the court is as an incident only to the fair, it cannot hold plea of obligations, or things happening be-

fore the fair; but where it is by prescription it may hold plea of an obligation, &c. though it appears that the obligation was made in the May before the fair. *Mo. 830. pl. 1116. S. C. — Cro. J. 313. pl. 14. S. C. & S. P. resolved, that they may be by custom in villis and boroughs for any causes, as debts upon bonds, or otherwise, or any causes done at any time, being transitory and personal, and so they are in divers cities, as Bristol and Gloucester, and a record was cited Mich. 8 Jac. Rot. 146, in case of *White v. Blunt*, where such a judgment in Gloucester was affirmed to be good; and Hill. 33 Eliz. in case of *Ferd v. Chambers*, where such custom was alleged to be in Canterbury, and held good. — 2 Bull. 21. S. C. & S. P. held accordingly; and *ibid.* 23. Arg. cites the cases of *Chambers v. Pert*, and *White v. How*. — S. C. cited D. 13a. b. Marg. pl. 80. as adjudged accordingly. — *Ibid.* cites Mich. 33 & 34 Eliz. *Parker v. Onely*, where error was brought on the recovery had by Onely against Parker, in debt for performance of covenants in the court of piepowders in Canterbury, and the file of the court was, "Placita tenta in Curia Pedia Pulveris in Civitate Cant." without saying, "in pleno mercato tenta" and Wray, Fenner, and Clench held this to be error, and judgment reversed against the opinion of Gawdy, because the plea was concluded, "juxta consuetudinem villæ prædictæ"; but says Note, 13 E. 4. 8. piepowders without a market, and this book was not remembered by any, which is verbatim contrary to this resolution.*

* *Cro. E. 256. pl. 31. Mich. 33 & 34 Eliz. B. R. Penred v. Chambers, S. C. & S. P. held per Cur. but the prescription must be in the file of the court. — S. P. Cro. C. 45, 46. Mich. 2 Car. C. B. Hodges v. Moyle.*

4. If 2 men make a contract for land in a fair that cannot be within their jurisdiction, and they are not to hold plea of such a contract, but only of buying and selling goods in the fair, and the mayor, if owner of the fair, cannot be a good steward of it; agreed

S. P. and it ought to be held before the steward, and cannot

be held before the mayor, unless by custom. Skin. 33. pl. 10. Anon.
per Cur. 2 Show. 181. pl. 180. Hill. 33 and 34 Car. 2. B. R.
Cholmley v. Morton.

(K. a. 2) [Court of Piepowders.]
Pleadings and Proceedings.

S. C. cited
D. 13a. b.
Marg. —
See (K. a.)
pl. a.

1. **I**T was assigned for error upon record given in the court of piepowders *secundum consuetudinem civitatis*, because it *did not say in pleno mercato vel feria*, and it was adjudged no error by reason of these words, *secundum consuetudinem civitatis*, so that it appears that the court of piepowders may be by custom without fair or market. Br. Error, pl. 171. cites 13 E. 4. 8.

2. Error was assigned upon a judgment in a court of piepowders in Gloucester, because the adjournment was entred *idem dies datus est*, whereas it should be *eadem hora*, but held good. Mo. 459. pl. 637. Mich. 38 and 39 Eliz. Anon.

They can-
not meddle
with any
matter but
what hap-
pens in the

3. If judgment be given upon a *contract made at a fair precedent*, and no plaint was then entred, it is erroneous. Jenk. 211. pl. 48.

pens in the market the same day. Cro. E. 773. Howell v. Jones.

4. If judgment be against defendant he must be *amerced*, or else the judgment is erroneous. Jenk. 211. pl. 48.

Such court
may be
held, though
not in pleno
mercato,

5. Such a court laid to be held by *prescription and charter* is well laid, the charter being a confirmation of the prescription. 2 Buls. 21. Mich. 10 Jac. Goodson v. Duffill.

&c. * but then it must be by prescription, and the prescription must be in the file of the court: Cro. E. 256. pl. 31. Mich. 33 & 34 Eliz. B. R. Fenred v. Chambers.

⊙ [20]

For more of the court of piepowders see Crompt. Jurisdiction of Courts, 229 to 230. b. &c.—4 Inst. 272. cap. 60.—Prynne's Animadv' &c. on 4 Inst. 190 to 199, &c.

(L. a) Courts of *Boroughs*, and other *Inferior Courts*. Of what Things they may hold Plea, [and in respect of the Declaration,] and try by Jury there.

See tit.
Escape (T)
pl. 3. S. C.
and the
notes there.
— Mar.
S. pl. 20.
Pasch. 15
Car. Anon.
S. P. and

[1. **I**F an obligation be made out of the jurisdiction of the court, though the action brought upon it is transitory as the other courts, as the courts at Westminster, that have a general jurisdiction, yet such inferior courts have not any jurisdiction of any thing that arises out of the jurisdiction, and therefore they have not power to hold plea thereof. Pasch. 15 Car. B. R. between *Richardson and Bernard* adjudged per Curiam, in an action brought

brought by him that recovered upon such obligation in an inferior court for an escape of him that was taken in execution upon the judgment against the officer that suffered him to escape; and adjudged, that this was coram non iudice, and meerly void; and that the officer shall take advantage thereof, and judgment given against him that brought the action for the escape, after a verdict for him. Intratur Trin. 14. Car. B. R. Rot. 1590. for there it appears by the declaration, that the obligation was made at a place in the body of the county out of their jurisdiction.]

case of *Gwinne v. Poole*, and said, that true it is, if it appears by the declaration, that the cause of action arose out of the jurisdiction of the court, all the proceedings after shall be void, & coram non iudice, and this was the reason of the judgment in the case of *Richardson v. Bernard*, in Roll's Abr. 545. 809. March's Rep. 8. because it appeared in the body of the declaration, that the place, where the obligation was made, was in the body of the county out of their jurisdiction; but where nothing of this appears by the plaintiff's declaration, it ought to be notified to the court by the defendant's plea to the jurisdiction of the court.

[2. In an action upon the case in an inferior court, if the plaintiff declares, that at a place within the jurisdiction of the court the defendant assumed, that in consideration that such a ship should go from Yarmouth, which was out of the jurisdiction, to Amsterdam, he would give to the plaintiff 5*l.* and avers, that the ship went from Yarmouth to Amsterdam, and thereupon the defendant pleads not guilty; this is not triable in this inferior court, because they cannot enquire of those things which are out of their jurisdiction, and without it the action does not lie, though the agreement was within the jurisdiction. Pasch. 15 Car. B. R. between *Brian and Langhorn* adjudged in a writ of error upon such a judgment in Newcastle, and the judgment reversed for this error. Intratur 15 Car. Rot. 465.]

received, that he would pay him such a sum when he returned into England from *Hamborough*, (being a place beyond the seas;) and because the action is brought of an act to be done at *Hamborough*, out of the jurisdiction of the court, it was holden error, and the judgment was reversed. Cro. C. 571. pl. 9. Hill 10 Car. B. R. Anon.

Debt was brought in *Bristol*, and the plaintiff declared for wages to be paid upon the performance of a voyage to be made in *locis transmarinis*. In error brought this was held to be ill; for they cannot enquire at *Bristol*, whether the party has performed the voyage or not; and judgment was reversed Sty. 260. Pasch. 1651. B. R. *Willis v. Bond*.

seems to be S. C. — S. C. cited by Baron (John) Powell. 2 Lutw. 1667. Mich. 4 W. & M. in a long argument in the exchequer, in the

Mar. 3. pl. 5. Anon. seems to be S. C. — Error of a judgment in the marshalsea, upon a promise made within the jurisdiction of that court, which was in consideration of such a sum

*[21]

[3. In an action upon the case in *Windsor court*, upon a promise that the plaintiff declares, that at *Windsor* aforesaid, within the jurisdiction of the court, in consideration that the plaintiff assumed to draw with four horses 1500 tiles from an house in *Hedley* in *Comitatu Bucks*, to the top of *Hedley-hill* ibidem, the defendant assumed to pay 5*l.* Though the defendant pleads non assumpsit, yet the court cannot proceed to try it upon this declaration, for that it appears in the declaration, that *Hedley-hill* and the house a quo, &c. are in *Comitatu Bucks*, of which the jury cannot take cognisance; and if they proceed to try it, the jury ought to inquire of it for damages. Pasch. 15 Car. B. R. between * *Ive and Stone* adjudged, and the first judgment reversed. Intratur Hill. 14 Car. Rot. 444.]

S. C. cited by Berkley J. and agreed per Cur. to be Law. Cro. C. 571. in pl. 8. for which see the case following.

* Fol. 546.

Cro. C. 570. 571, pl. 8. Ireland v. Lockwell, S. C. and held that the allegation was only for the increase of damages which they may inquire of in any place whatsoever.—Jo. 450. pl. 1. Ireland v. Blockwell 1587, and after, Hill. 15. Car. the judgment was affirmed, because S. C. and judgment

[4. In an action upon the *case in the court of Bath* in comitatu Somerfet, if the plaintiff declares, that he was a taylor, and that he used the said art for several persons inhabiting tam infra civitatem prædⁱ, quam ulibi infra regnum Angliæ, and the defendant, to scandalize him in his said art, said these words of him; *thou hast stole as much cloth out of my suit and cloak which thou madest for me, as did make thy wife a waistcoat*, by which he lost his said customers; though the defendant pleads not guilty, yet the court cannot proceed to try it upon this declaration, for that the jury upon the trial ought [not] to give damages for the loss of customers out of the jurisdiction of the court. Mich. 15 Car. B. R. between *Stowel and Ireland*, per Curiam in a writ of error upon a judgment in Bath, and it was reversed accordingly, but after a day was given over to the next term. Intratur Trin. 15 Car. Rot. 1587, and after, Hill. 15. Car. the judgment was affirmed, because it was so alleged only for damages.]

affirmed by three justices, contra Barkley, for he might lose customers who dwelt out of the jurisdiction, and yet the customers may be within the jurisdiction.—Case, &c. in the Marshalsea for these words, you are a whore; and the plaintiff declared, that by reason of speaking the words, she lost her marriage; after verdict and judgment for the plaintiff, error was assigned, that the loss of marriage, which was the cause of action, doth not appear to be within the jurisdiction of the court, and the other words are not actionable, and the judgment was reversed. Raym. 63. Mich. 14 Car. 2. B. R. Littleboy v. Wright.—Lev. 69. S. C. accordingly.—Sid. 85. pl. 14. Littlebury v. Wright. S. C. but no judgment.—Keb. 328, pl. 63. S. C. adjournatur.—It was agreed clearly, that if that which is the gist of the action, and the complaint cause of it be laid within the jurisdiction, and the declaration shews further matter, which is only aggravation or consequential damage, without which the action would have lain, such matter need not be averred to be within the jurisdiction; as in case for calling a woman whore, whereby she lost her marriage, there not only the words, but the loss of marriage also must be alleged to be within the jurisdiction, because the one without the other would not maintain the action, and there one may confess the words, and traverse the damage. So in trespass by a matter for the battery of his servant, whereby he lost his service; the loss of service, as well as the battery must be laid within the jurisdiction. 6. Mod. 224. Mich. 3 Anon. B. R. and cited and allowed the principal case in Roll.—1 Salk. 404. pl. 1. S. P. and that in case for calling the plaintiff whore, per quod maritragium amisit, the loss of marriage must be laid infra jurisdictionem; for that is the gist of the action; but otherwise for calling her thief, &c. Per Cur. Obiter.

*[22] [5. In an action upon the *case in the mayor's court of Oxon.* if the plaintiff declares, that in consideration the plaintiff would buy, or procure to be bought, wines in London, and would convey them to Oxford to the defendant, to be sold by him, the defendant assumed at Oxford to pay to the plaintiff the money laid out by him for the wines and carriage of them, and the moiety of the clear profits arising by sale thereof, and the defendant pleads non assumpsit to this; in this case the court of Oxford cannot try it, because they cannot * inquire of the performance of the consideration for damages which is performed out of their jurisdiction, scilicet, the buying of wines in London, and the carriage of them to Oxford from London. Pasch. 1649, between *Turner and Tyler*, adjudged in a writ of error upon such judgment in Oxford, after verdict for the plaintiff after non assumpsit pleaded, and the judgment reversed accordingly. Intratur Mich. 24 Car. B. R. Rot. 210.]

alleged, that he brought them accordingly; and that 42l. was minus satis to satisfy him, and that he required payment of the 42l. but the defendant had not paid it. Upon demurrer it was adjudged for the plaintiff, and affirmed in error; for when he shews that he did not require more, that suffices. Cro. J. 552. pl. 14. Mich. 17 Jac. B. R. Griffin v. Charles.—A writ of error was brought

to reverse a judgment given in the court at Bridgwater, in an action of the case upon an assumpsit to pay such a sum of money at the defendant's return out of Ireland. The court held that Bridgwater hath no power to enquire of a thing done beyond their jurisdiction, and Ireland is out of their jurisdiction, whence the party upon the assumpsit was to return. Sty. 191. Hill. 1649. Roberts v. Tucker.

[6. In an action upon the case in the court of Launceston in Cornubia, if the plaintiff declares, that *whereas he was an attorney of the hundred court of Stratton in Cornubia, the defendant having communication with J. of the said office of the plaintiff, said these scandalous words of him, within the jurisdiction of the said court of Launceston, thou art a cheater, &c.* After verdict for the plaintiff, and damages given, and judgment, this is error, for that the jury could not inquire whether the plaintiff was an attorney of the hundred court, this being out of their jurisdiction, and this being the principal cause of the action and damages. Pasch. 1651. between Facie and Heddon, adjudged per Curiam, and the judgment in Launceston reversed accordingly.]

[7. If an inferior court hath jurisdiction to hold plea of any sum under 40l. [and] an action upon the case [is brought there] upon a promise, in which the defendant assumed to perform an award made by J. S. or otherwise to pay to the plaintiff 40l. this action does not lie in this inferior court, though the plaintiff acknowledges himself satisfied [of part of the damages] to draw it within the jurisdiction of the court, because it consists in damages to be assessed by the jury, and the jury may give more or less damages than 40l. and therefore before the damages are made certain by assessment of the jury, the plaintiff cannot acknowledge satisfaction of any part thereof. Pasch. 15 Car. B. R. between Gilbert and Wilkins adjudged per Curiam, in a writ of error upon a judgment in Banbury, and (*) judgment there given reversed for this cause among others. Intratur Trin. 14 Car. Rot. 755.]

* Fol. 547.

[8. An inferior court cannot hold plea of an obligation, contract, battery, or other transitory actions, if it was not made within the jurisdiction of the court, inasmuch as the jurisdiction of the court is limited to things arising within the jurisdiction. Mich. 15 Car. B. R. per Curiam, præter Barkly, who inclined the contra for the common practice of such courts.]

Sec tit. Prohibition (1. a) pl. 2. S. C. and the notes there.

9. In writ of error by W. against B. upon a judgment given in the court of the city of Bristol, the case was, that B. was plaintiff in the said court against W. in an action of covenant, and declared of a covenant made by word by the testator of W. with B. and declared also, that within the said city there is a custom, that *conventio ore tenus facta* shall bind the covenantor as strongly as if it were made by writing; and it was holden by the court, that that custom does not warrant this action, for the covenant binds by the custom the covenantor, but does not extend to his executors, and a custom shall be taken strictly, and therefore the judgment was reversed. Le. 2. pl. 3. Hill. 25 Eliz. B. R. Wade v. Rembo.

[23]

10. A man recovered debt and damages in B. R. and afterwards brought action of debt against the bail in the court in the tower of London. Upon this judgment, and after a summons and nihil

nihil returned, the defendant was taken by a capias and refused, and thereupon the plaintiff brought an action on the case in the same court against the rescuer for the rescue, and upon a motion a prohibition was granted, for that the original foundation of this action commenced in this court. Roll Rep. 54. pl. 28. Trin. 12 Jac. B. R. Anon.

11. In trespass *vi & armis* at Doncaster the plaintiff declared that the defendant took certain cows of his out of the jurisdiction of the court, and brought them within the jurisdiction, and there disposed of them to his own use. After judgment for the plaintiff it was assigned for error, that in regard the taking, which is the ground of the action, was without the jurisdiction of the court, although the disposing of them was within, yet the court had no jurisdiction of the cause, which Roll Ch. J. agreed, and said, that if the action had been a *trover* and *conversion* it had been good, but being a *trespass vi & armis* it is naught, and reversed the judgment Nisi. Sty. 313. Hill. 1651. B. R. Keithley v. Nodes.

12. A *quantum meruit* for work done in London will not lie in an inferior court, though the promise were made good within the jurisdiction, for the jury must enquire of the worth. Freem. Rep. 214. Mich. 1676. in Oldenburgh's case.

13. An *assumpsit* for rent, though there were a special promise, ought not to be brought for rent in an inferior court, because it concerns the realty; Held. Freem. Rep. 214. pl. 221. Mich. 1676. in Oldenburgh's case.

14. If an inferior court has jurisdiction over the cause of action, no prohibition ought to go upon a suggestion that the cause of action arose out of the jurisdiction, but you ought to plead to the jurisdiction, and if they refuse such plea, then move for a prohibition; per tot. Cur. And Holt said, there have been cases to the contrary, but the law is now settled otherwise; and if a person pleads in chief, he shall never assign this for error, if such inferior court has jurisdiction of the thing. 11 Mod. 132. Trin. 6 Ann. 1707. B. R. Anon.

(L. a. 2) Inferior Courts. Process and Proceedings therein.

1. **I**N *trespass*, the defendant justifies by warrant directed to him in the court of R. by the steward there, to attach the plaintiff by his goods within the hundred, to answer one A. by virtue whereof he entred the house, and took the goods, as bailiff. Jones for the plaintiff demurred, because it is not shewed what was the cause, or that the court had jurisdiction thereof, which the court agreed, and that such court cannot direct a warrant to a bailiff of a hundred. Keb. 838. pl. 22. Hill. 16 and 17 Car. 2. B. R. Watkins v. Cad.

See tit. Process, (D.) pl. 1. 2. in the notes there

2. A summons must be returned before a capias shall issue out of an inferior court, or else the bailiff, who executes the capias, is guilty

guilty of false imprisonment. Vent. 220. Trin. 24 Car. 2. B. R. Read v. Wilmot.

where this case is denied.

* 3. If an attachment goes out of the county court without a plaint, he that executes it cannot justify. Vent. 220. Trin. 24 Car. 2. B. R. in case of Read v. Wilmot.

4. In a cause commenced in an inferior court, if issue be not joined within six months after appearance, the cause ought not to be removed by habeas corpus, a special return being made thereof by virtue of the statute; and this was agreed by the court on debate in this cause, a complaint being made against Mr. Staples, the steward of Windsor. 2 Show. 394. pl. 362. Mich. 36 Car. 2. B. R. Halter v. Whitfield & al'.

5. The regular process in inferior courts is a *poena in case*, and a *summons in debt*, but however, the misawarding of process is cured by the defendant's appearance; per Holt. Comb. 260. Pasch. 6 W. & M. in B. R. Anon.

6. Holt. Ch. J. said, that Twisden was once strongly of opinion, that a *capias* does not lie in an action on the case in an inferior court; but that upon consideration of the book. H. 6. Twisden said, he was convinced that a *capias* well lay. Comb. 260. Pasch. 6 W. & M. B. R. Rogers v. Marshall.

7. In inferior courts the course is, to enforce an appearance by distress, and that ought to be reasonable, and if a *rescous* be made to a reasonable distress, the steward may impose a fine for it; and it would be too much to distrain goods to the value of the debt demanded; and the officer cannot justify the breaking an house to take such distress. And though inferior courts may grant other process out of court, yet can't they grant an attachment on contempt but in court; per Holt Ch. J. 12 Mod. 610. Hill. 13 W. 3. Anon.

8. Judgment was given in the town court of Bristol, and costs taxed, and a *scire facias* taken out against the bail, and a year afterwards the court granted a new trial, and set aside the first judgment, and an attachment was granted against the judge for this cause. 1 Salk. 201. pl. 4. Trin. 1 Ann. B. R. The Queen v. Hill.

9. An attachment was prayed against W. the town clerk of an inferior court, for refusing an appearance on an attachment which was tendered without putting in bail, but upon restoring of the goods the matter ceased. Powel J. said, it is the course of inferior courts to take special bail even in case of an executor, but upon an habeas corpus we will discharge him. There is process of *capias* in an inferior court, and upon this there may be special bail, because their jurisdiction is limited, but this is never upon process by attachment, because this process is against the goods. Hill. 10 Ann. B. R. The Queen v. Wakefield, and the balliffs of Litchfield.

10. A motion was made for an attachment against Mr. Street, Steward of the borough court in Southwark, alleging, that there had been a verdict there pro quer' and judgment and execution executed, and that he had granted a new trial, which he ought not to have done, and set aside all the proceedings on the verdict and afterwards; but it appearing, that after issue was joined there was a reference

a reference and an agreement, that plaintiff should not go on to trial, yet plaintiff brought on his cause, and had a verdict for all his damages, viz. 20l. whereas his real demand was not above 7l. and this being made appear to the steward that the defendant was surpris'd, he sat aside all the proceedings, and having offered the plaintiff, that if he would try the right in a feigned issue the money should remain in court for security, but this being refused, he granted a new trial, and the complainant appearing to be vexatious, the court ordered the plaintiff to pay 13s. 4d. costs; for it was agreed, that *though an inferior court cannot grant a new trial after a cause hath been fully heard, yet where a verdict is obtained by surprise, or through any irregularity, it may there be set aside.* [25] The judge may and ought to enquire into it, and the defendant here made no defence, nor knew any thing of the matter, 'till execution executed. Hill. 8 Geo. B. R. Street's case.

(L. a. 3) How they must demean to the Superior Courts.

1. **I**F records are, or writ of false judgment, or certiorari, or writ of error comes, the power of the court surceases, and it is error if they proceed after it. Br. Judges, pl. 17. cites 6. H. 7. 16.

2. If a writ of error be directed to an inferior court; they ought to execute it in all things though their fee be not paid nor tendered to them; and the secondary said, that the fee which is demanded by them ought to be indorsed upon the return of the writ of error, so that the judges may judge if it be reasonable, and that divers precedents warrant that accordingly. Lane 16. Hill. 4 Jac. in the exchequer, mayor of Lincoln's case.

Noy 90.
Ganton v.
Ganton,
S.C. accord-
ingly, and
judgment
reversed.

3. In all particular and private jurisdictions, if they come to be certified in B. R. in a writ of error you must set out their power; but if they have their power by a statute, as Wales, then it need not be set forth; per Hyde Ch. J. Godb. 381. pl. 466. Pasch. 3 Car. B. R. in case of Gunter v. Gunter.

—Lat. 189. Ganton v. Ganton, S. C. and judgment reversed.

(L. a. 4) Favoured or restrained by the Superior Courts. And what shall be an admitting the Jurisdiction.

1. **T**HOUGH execution of a judgment had in an inferior court of record having power to hold plea above 40s. as in London, Oxford, &c. cannot be had of any other goods than such as are within the jurisdiction of that court, yet if the record of a judgment be removed into Chancery by certiorari, and thence by mittimus into B. R. or C. B. execution may be had upon any goods in any county of England. Went. Off. Ex. 138.

2. B. R.

2. B. R. *never gives judgment upon a conviction in another court*; but if, after issue joined in another court, the indictment be removed, the party is always admitted to waive the issue below, and plead de novo, and go to trial upon issue joined in this court. Carth. 6. Trin. 3 Jac. 2. B. R. The King v. Baker.

3. In debt on a *bond sued in the court of the sheriffs of London*, upon not guilty, it appeared, that *the bond was made out of the jurisdiction of the court*, and therefore it was objected, that the proceedings were coram non iudice, and void, and that the serjeant, by executing the process, was a trespassor; but adjudged for the plaintiff, and by Holt Ch. J. to which the rest agreed, 1st, where an inferior jurisdiction is confined to persons, as the Marthalea was to those of the king's household, *if it appears by the declaration, that the person, who sues, is * qualified to sue, though in truth he is not*; yet, *if the defendant does not plead to the jurisdiction*, but comes in and admits it, *he shall never take advantage of it afterwards*; but if it is not averred in the declaration, that the person is qualified to sue, and within their jurisdiction, all the proceedings are void & coram non iudice, and trespass lies against the officer. 1 Salk. 201. Lucking v. Denning.

*[26]
a Mod. 195
&c. Hill.
28 & 29
Car. 2. C. B.
Higginson
v. Martin,
S. P. the
court di-
vided —
Freem.
Rep. 322.
pl. 402. S.
C. and by
North,
Windham,
and Atkins,
judgment
was given
for the of-
ficer, for it
was impos-
sible for him to know whether the fact was done within the jurisdiction of the court or not, but as to the plaintiff in the inferior court, they gave judgment against him; for though the officer could not take notice (it being alleged in the declaration to be within the jurisdiction of the court) that it was without, yet the plaintiff himself shall be bound to take notice of it; and though the defendant did not take notice of it there, yet he shall not be estopped to do it here, by admitting a matter in an inferior court in a cause that they had no jurisdiction of; but Scroggs was e contra, because there was a judgment in being, and so long as that continued in force, it should patronize those that acted under it till it were reversed by writ of error. But North said, that that would not alter the case; and cited the case of Richardson v. Bernard, 1 Rol. 810. in which case there was a judgment. — a Mod. 195. S. C. and the court were all of opinion as to the point of the officer; but as to the estoppel by admitting the jurisdiction before, the court was divided, the Ch. J. and Windham held, that it could not give the court a jurisdiction where it had none originally, and that so it had been resolved in one *Squibb's case* in a special verdict; but Atkins and Scroggs held e contra. — Jurisdiction is admitted by plea, and by admitting it the defendant is for ever after estopped; per Holt Ch. J. 11 Mod. 51. Pasch. 4 Ann. B. R. in case of Lutin v. Menin,

4. They held 2dly, that *where it is confined to some particular things, and the suit there is for something else*, of which they have no jurisdiction, all is void, and by no admission can be made good. 1 Salk. 202. in S. C.

5. And they held 3dly, that where they are *confined to place (viz.) to all contracts arising within such a district*, though the contract arises out of it, yet the court may award process, and the officer may execute it, unless it appears to him, that it arose out of the jurisdiction; *as if this bond had been dated at York*; but he is not bound to enquire either whether there is a cause of action, or where it did arise. 1 Salk. 202. Lucking v. Denning.

6. But where a *defendant pleads to the merits of the cause, and not to the jurisdiction* of the court, he can never then take advantage of the want of jurisdiction; for by the averment of the count, and his own admission, *he is stopped to say, that it was a matter that arose out of the jurisdiction*; and it is impossible the court should know where a transitory matter arises, unless the defendant acquaints them with it. 1 Salk. 202. S. C.

7. Upon

S. P. per
Cur. 7 Mod.
1. Anon,
but seems to
be S. C.

7. Upon a motion for an attachment against a steward of an inferior court, for *discharging a jury before they gave their verdict*, it was held, that if a jury in such court will not agree on the verdict, the way is, as in other courts, to *keep them without meat, drink, fire, or candle, till they agree.* 1 Salk. 201. pl. 3. Palch. 1 Ann. B. R. Anon.

7 Mod. 1.
S. P. per
Cur. and
seems to be
S. C.

8. All *misdemeanors in judicial officers of inferior courts* are *contempts to the courts of King's Bench*, and therefore attachments go daily against stewards of those courts, for granting an attachment against all the party's goods. But for error in judgment, a judge is not punishable. 1 Salk. 201. pl. 3. Palch. 1 Ann. B. R. Anon.

[27] (L. a. 5) Count and Pleadings, and Proceedings in Inferior Courts.

8 Rep. 133.
a. Palch.
8 Jac. C. B.
S. P. in Tur-
mer's case
— Cro.
J. 53a. pl.
14. Palch.
17 Jac.
B. R. in
case of Pendarvis v. Kingdon, S. P. — Cro. C. 46. pl. 5. Mich. 2 Car. C. B. in case of
Hodges v. Moyse, S. P.

1. IF an inferior court holds plea, and in the stile of the court it does not appear how it holds it, viz. by charter, or by prescription, the proceedings in this plea are erroneous, and all which follows upon it. For all jurisdiction to hold plea rests in the crown, and therefore it ought to be *ascertained to the king's court, how this power is derived from the crown.* Yelv. 46. Hill.

2 Jac. Moufe's case.

Cro. C. 46.
pl. 5. Mich.
2 Car. C. B.
in case of
Hodges v.
Moyse, S. P.
per Curiam.

2. In inferior courts it is *not necessary to set forth in their records by what title and authority they hold pleas*; but otherwise when they certify; per the chief justice and Jones. Lat. 182. Mich. 2 Car. in 7 of Gunton v. Gunton.

Noy 96.
S. C. & S. P.
held to be
error.

3. A. brought action against B. in the *court of the verge*, and recovered; and upon error brought the error assigned was, that the plaintiff declared of a trespass in *St. Martin's within the jurisdiction*, and upon not guilty a *Ven. fac.* was from *St. Martin's prædict* and says *not infra jurisdictionem*. And this being a *court which varies* and alters the limits of the jurisdiction according to the *resiance and remove of the king*, it may be that *St. Martin's* was *infra jurisdictionem* at the time of the contract and the declaration, and yet was not at the time of the *Ven. fac.* being several months after; and therefore he ought to have said *infra jurisdictionem*, as in the declaration. And Doderidge and Jones, being only present, for this cause held it was error. Lat. 214. Palch. 3 Car. Thair v. Foffet.

Jo. 448. pl.
12 Thurston
v. Vincent,
S. C. and
the court
held it well.

4. In case for bringing an action in the court of *Bristol*, at the suit of H. without his privity, whereby the plaintiff was imprisoned, and so all his creditors came upon him, and he lost his credits, &c. after verdict for the plaintiff, error was brought and assigned, because it was not shewed that the causes of actions which the other creditors had against

against him did arise within the jurisdiction of the court of Bristol. Berkley held the damages ill assised, because they were given as well for the actions brought by the other creditors. But Brampton J. contra; because the actions brought by the other creditors, were added for aggravation only, and the cause of the action was the arrest and imprisonment, like the case where a man speaks words which are in part actionable, and others only put in for aggravation, and damages assised for the whole, it is good. Mar. 47, 8. pl. 76. Trin. 15 Car. Thurston v. Ummons.

5. In error to reverse a judgment in the *Martha Lee* the court affirmed, that all matters transitory, as well as other matters, ought to be alleged to be within the jurisdiction; but if one lends a horse at Hull to ride to Beverley, and to redeliver the horse at Hull at a certain time, an action lies for this in the court of Hull; because it is founded upon the loan and failure of the redelivery. Sid. 180. pl. 17. Hill. 15 and 16. Car. 2. B. R. Inman v. Batten.

6. Error of judgment given in the court of York, where the plaintiff declared, that the defendant being indebted to him at York *infra jurisdictionem* for goods to him sold and delivered, adtunc & ibidem promised to pay; and the judgment was reversed, because it is not shewn at what place the goods were sold, and it might be out of the jurisdiction. Lev. 156. Hill. 16 and 17. Car. 2. B. R. Stone v. Waddington.

judgment was always to the contrary, but precedents had been so.

7. Where an officer of an inferior court justifies by force of the proceedings, there he ought to shew the jurisdiction whether by prescription or by charter; and if by charter, he ought to make a *proferri hic* in Cur. of the letters patent. But if the plea be pleaded by a stranger, he need not shew such certainty; for this would be to lay him under an impossibility. Sid. 311. pl. 23. Mich. 18. Car. 2. B. R. Chute v. Newton.

46. pl. 58. the case of *Hodges v. Moyle*, to which Moreton agreed.

8. The plaintiff in the inferior court complains that B. such a day and place, being indebted to him *infra jur'* &c. for money lent, did *dis & loco prodicto* assume to pay, and doth not say, that the money was lent *infra jurisdictionem curiae*. Per Vaughan, if he had declared upon the promise in law, that did arise upon the lending of the money, he ought to alledge, that the money was lent *infra jur'* &c. But if money be lent out of the jurisdiction and express promise within to pay it, the court may hold plea of this promise. Sed alii aliter senserunt, because he cannot plead non assumptit *infra jurisdictionem*, sed quære rationem. Freem. Rep. 317. pl. 392. Mich. 1673, C. B. Baker v. Holman.

9. *Trespass* for taking his goods. The defendant pleads, that process issued out of an hundred court to seize the goods for not appearing, the plaintiff demurred, because it was not alledged that the cause of action did arise within the jurisdiction of the court; and the demurrer held good. Freem. Rep. 260. pl. 279. Trin. 1679. Stainton v. Randall.

10. Debt

10. *Debt upon a bond* against an executor, who *pleaded that in curia domini regis de recordo tent' 4 die Novemb. anno regni domini regis nunc 34. apud Guildhall civitat' Norwic' coram A. & B. Vicecom' ejusdem civitatis, one Lilly brought debt against him on a bond for 500l. and recovered, and so pleaded plene administravit præterquam, &c. quæ non sufficiunt, &c. defendant demurred generally, and adjudged per tot. Cur. for the plaintiff, because the defendant did not shew by what authority this court was held, viz. by prescription, grant, or otherwise, according to Turner's case, 8 Rep. [133. a.] 3 Lev. 141. Mich. 35 Car. 2 C. B. Jones v. Moldrin.*

Show. 310. Mich. 3 W. & M. in case of Phylerv. Bofon, 11. The statutes of *Jeofails* extend to inferior courts after verdict; allowed per Cur. Comb. 260. Pasch. 6 W and M. in B. R. Anon.

cites a Saund. 257. S. P. allowed by the judges in the house of lords, that they are helped by the 21 Jac. cap. 13. and says, that of this opinion was all the court, and judgment in the principal case, for which this was an express authority; for that the discontinuance of process is helped by the common law, and a discontinuance of court is helped after verdict by the statute of *Jeofails*, and says, that so they held in another case this term, in the case of Walvin v. Smith.

Ld. Raym. Rep. 211. Pasch. 9 W. 3. S. P. in Lee's case, but the principal point there was an action for 12. False judgment from a county court, where debt was by justices, the declaration was, that the defendant was indebted to the plaintiff within the jurisdiction of the court, for goods sold and delivered, and because it was not alleged that the contract was within the * jurisdiction, judgment was reversed, for if one be indebted to the other, he is so wherever he goes. 12 Mod. 598. Mich. 13 W 3. Stedman v. Robifon.

money lent, and because it was not said that it was lent *infra jurisdictionem Curie*, judgment was reversed; for per Cur. though the debt is transitory, and is a debt in every part of England, yet it ought to be laid to arise within the jurisdiction of the inferior court; but if the plaintiff had shewn, that the money had been lent *infra jurisdictionem curie*, or if it had been for goods there sold, the plaintiff would have had no need to say, that the defendant assumed to pay *infra jurisdictionem curie*, because the law creates the promise upon the creation of the debt, which debt being within the jurisdiction, the promise shall be intended there also.

*[29]

13. Let a debt be contracted where it will, if *bond is given* for it, within the jurisdiction of an inferior court, that gives them jurisdiction. 6 Mod. 303. Mich. 3. Ann. B. R. Villars v. Cary.

But it was laid down as a rule, that if the matters so inserted are essentially necessary to maintain the action, they must be averred to be within the jurisdiction, i. e. where the one without the other will not maintain the action. 6 Mod. 223. S. C. — 11 Mod. 7. Stanmer v. Davers, S. C. accordingly. 14. In actions in inferior courts, every part of that which is the gist of the action, must appear to be within the jurisdiction, otherwise of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remain; per Cur. 1 Salk. 404. pl. 1. Mich. 3. Ann. B. R. Stannion v. Davis.

See Freem. Rep. 124. pl. 122. Pasch. 1673. B. R. Anon. S. P. debated. — Ibid. 314. pl. 287. S. P. 15. Nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged so; that where an action is brought on a promise in a court below, not only the promise, but the consideration of the promise, must be alleged to arise within an inferior jurisdiction; because such inferior courts are bounded in their original creation to causes arising within the limits

Limits of such new erected jurisdiction; and therefore if a debtor, that has contracted a debt out of such limited jurisdiction, comes within it, yet they cannot sue there for such a debt; because the cause of action did not arise within such jurisdiction; and therefore it is not within the limits of their commission to try and determine; and therefore *the consideration of the promise which is the cause of the action, must be alledged to be within the jurisdiction* of the court; and not only so, but it *must be proved upon the trial*; and if the plaintiff prove a consideration out of the jurisdiction, that cannot be given in evidence; and if it be, the defendant's counsel may propose a bill of exceptions, and the bill will appear to be erroneous; and therefore Saund. 74. in case of Deacock v. Best, makes a true distinction between counties palatine, and other inferior courts. Gilb. Hist. of C. B. 152, 153.

Saund. 74.
Pasch. 19.
Car. 2. S. P.
— S. P.
per Cur.
Sid. 331. pl.
13. in S. C.

(L. a. 6) The Offence and Punishment of bringing Actions there, in Cases where they have no Jurisdiction.

See Tres-
pafs (C. a.)
See Actions
(C. a.) pl.
26.

1. IF one is arrested by process in an inferior court, for a cause arising out of their jurisdiction, the party may maintain an *action against the plaintiff who levied the plaint*; for he is supposed to know where the cause of action arose, *but not against the judge or officer, who had executed it*; for they cannot tell, whether it arises within their jurisdiction or not. 2. Jones. 214, 215. Trin. 34 Car. 2. B. R. Olliet v. Bessley.

Contra if
they knew it
arose out of
their juris-
diction.

Lutw. 1566.

—But

Gwyn v.

Pool, it was

held, that

trespafs and false imprisonment will not lie against the judge, officer or party. 1st. No action lies against a judge for what he doth judicially. 2dly, Nor against the officer for executing the process of a judge, or court who has jurisdiction, though the process be erroneous, or in verso ordine. 3dly, Nor of the party, for in this case of a bond, it doth not appear where it was executed, nor can the party know the extent of the inferior court, nor is it clear, that case will lye merely for this if the plaintiff knew it, unless ea intentione to hold him to bail. 4 Lutw. 935. Mich. 4 W. & M. in the exchequer.

*[30]

2. Some jurisdictions are limited; 1st. as to the subject matter, as the commissioners of excise touching impositions for strong waters, and they adjudged low wines to be strong waters, which was an excess of their jurisdiction, and therefore an action lay against them. So Marthalsea Case, Co. 10, they have jurisdiction in debt and covenant, where both parties are of the household, and in trespass where one of them was of the household, but this did not extend to trespass upon the case and their holding plea in assumpsit, was coram non iudice. So in case where there is a founder of an eleemosynary foundation, and a visitor is appointed, and his jurisdiction is limited by rules and statutes, if the visitor in any sense exceeds these rules, an action lies against him, as was agreed in the case of Exeter college; but contra where he is mistaken in a thing within his power, though there is no appeal over. 2dly, In respect of the persons as in the case of the Marthalsea, where the parties ought to be of the household, &c. ut supra, or

all is coram non iudice. 3dly, *In respect of the place*, as justices of peace in relation to the poor, for their relief within their several parishes, but if they tax S. to the relief of the poor of D. this is an apparent excess of jurisdiction, and the justices and officer are liable to an action. Of this sort are inferior courts in corporations. But where the inferior court has cognizance of the action, and is only restrainable in it at the pleasure of the party, by pleading to the jurisdiction, especially where the action will lie as well within as without the jurisdiction, as all transitory matters, where it cannot appear whether they arise within or without the jurisdiction, and therefore if the person can be come at by process, over whose person they had jurisdiction, and he omits to plead to the jurisdiction, by pleading over to the merits he is concluded forever. The reason of a prohibition is the same, which is to hinder the party from being wronged, yet if the party plead to the merits no prohibition lies, for he has estopped himself by pleading, but if all the proceedings were void & coram non iudice, if the party has pleaded, yet a prohibition ought to go. Where it appears in the declaration, that the cause arose out of the jurisdiction, all the proceedings will be coram non iudice, but where nothing of this appears thereby, it must be notified to the court by the plea of the defendant to the jurisdiction, which plea, if the court refuses or accepts it and proceeds afterwards, if it be offered before imparlance and upon oath as it ought to be, all proceedings are void, and the judge and officer liable to actions. See W. 1. cap. 35. By pleading to the action the defendant cannot have an action upon this statute, and therefore the superior courts refuse to grant prohibitions upon suggestions that the cause arose out of the jurisdiction, until the defendant has pleaded this matter to the jurisdiction of the inferior court. 2 Lutw. 1565, 1566, 1567, in the Appendix 4 W. & M. in the argument of Baron (John) Powell in Scacc. in the case of Gwyn v. Pool.

[31]

3. If suits be in *inferior courts* without cause an action lies, but not for a causeless suit in the courts at Westminster; and *false imprisonment* lies for one taken by process out of the inferior court, if the cause arose not within their jurisdiction. 2 Show. 374, pl. 360. Trin. 36 Car. 2. B. R. Anon.

4. On an *information against an attorney of the sheriff's court of London, & al' for arresting a man in a sham action, holding him to bail, &c. to get money from him, &c.* the court said, that if there had been any wrong done, the *remedy is to apply to a judge of the inferior court*, who had power to punish the attorney and the bailiffs, and order satisfaction, &c. Mich. 6. Geo. B. R.

See Habeas Corpus (H) (O) See Superfideas (I) See Tit. Habeas Corpus (E) pl. 2, 3, and the notes there,

(L. a. 7) Of removing Causes out of Inferior Courts.

1. 43 Eliz. cap. 5. **N**O writ of habeas corpus, or other writ sued forth to remove an action, shall be allowed,

allowed, unless it be delivered unto the judge or officer of the court before the jury appear, and one of them be sworn.

2. 21 Jac. 1. cap. 25. S. 2. *No writ to remove a suit in an inferior court shall be obeyed, unless delivered to the stewards, &c. of the same court, before issue or demurrer joined, so as such issue or demurrer be not joined within six weeks after the arrest or appearance of the defendant.*

On a Habeas Corpus it was returned that issue was joined before the

writ came to him, but did not say, that issue was not joined within six weeks, &c. as it ought to be by the statute, and therefore ill; there was likewise another fault, because it being in an inferior court, it is not returned, that the cause of action arose within the jurisdiction. Comb. 127. Trin. 1 W. & M. in B. R. Anon.

3. 21 Jac. 1. cap. 23. S. 3. *If any such cause shall be removed or staid by any such writ or process, and afterwards the same cause shall be remanded, the same cause shall never afterwards be removed or staid before judgment by any writs whatsoever.*

4. S. 4. *If in any cause not concerning freehold, lease or rent, it shall appear or be laid in the declaration, that the debt, damages or things demanded do not amount to 5l. such cause shall not be stayed, nor removed in any other courts by any writs other than writs of error or attain.*

12 Geo. 1. cap. 29. S. 3. The judges of such inferior courts as are described in

Stat. 21. Jac. cap. 23. par. 3. may proceed in causes therein specified, which appear or are laid, not to exceed 5l. though there may be other actions against such defendants, wherein the plaintiff's demands may exceed 5l. This was a temporary act, and continued by 5 Geo. 2. cap. 27. from the end of that session for seven years, &c.

5. S. 5. *If any writ shall be sued forth contrary to the intent of this act, it shall be lawful for the judge or officer, to whom such writ shall be directed, to disallow the same, and to proceed as if no such writs had been granted.*

6. S. 6. *Provided that this act shall extend only to such courts of record, and for so long time only, as there shall be an utter barrister of three years standing, that shall be steward, town-clerk, judge or recorder of the same court, or that shall be assistant to such judge, and there present, and not of counsel in any cause then depending in the same court.*

It was held by Holt Ch. J. that where an Habeas Corpus is directed to an inferior court of

which an utter barrister is steward, and in fact the issue of the plaint was not joined more than six months after the appearance of the defendants there; so that by the statute 21 Jac. the steward had liberty to proceed notwithstanding, and without the allowance of the writ; yet in this case the steward is bound to return the writ with the special matter, otherwise he shall be in contempt; and so it was constantly ruled in B. R. when Hale was Ch. J. Comb. 69. Mich. 1 W. & M. in B. R. *Watson v. Clerke*——Issue was joined in an inferior court, and the steward refused to allow the Habeas Corpus, and the cause was tried but not before an utter barrister, as is directed by the statute; the court held, that the steward ought to return the Habeas Corpus; and they having proceeded to try the cause, no utter barrister being steward, an Attachment was awarded. 3 Mod. 85. Mich. 1 Jac. 2. B. R. Anon.

*[32]

7. S. 7. *This act shall not extend to any cause wherein any such plea shall be pleaded, as could not be tried within the jurisdiction of such inferior court.*

8. By 21 Jac. after a *Procedendo* awarded, no *superfedeas* ought to be granted, unless it unduly vel improvide emanavit, in which cases it is usual to grant one. Cro. C. 487, pl. 11. Mich. 13 Car. B. R. *Bower v. Cooper*.

9. *No court can be exempt from the superintendency of the king in his court of B. R.* It is a consequence of every inferior jurisdiction of record, that their proceedings be removable into this court, to have their record inspected, and to see whether they keep themselves within the limits of their jurisdiction. 1 Salk. 144, pl. 3. Trin. 12 W. 3. B. R. in case of Groenvelt v. Burwell.

(L. a. 8) Judgments in Inferior Courts. When void.

1. **W**HERE judgment is given in a *base court*, or peculiar, of *contract, covenant, or land which lies out of the jurisdiction of the court*, it is void, and the party of the execution shall have assise or trespass. Br. Judgment, pl. 64. cites 22 Aff. 64.

2. *But where it is given there of franktenement upon plaint, where it ought to be sued by writ*, this is not void, but error, and there it is agreed in effect, that franktenement shall not be recovered in court baron but by writ, and not by plaint, and if it be it is error, and false judgment lies. Br. Judgment, pl. 64. cites 22 Aff. 64.

Yelv. 130.
Trin. 6.
Jac. B. R.
the S. C.
and the
ideo videtur
was ad-
judged er-
ror; for it
ought to be

3. Error upon a judgment in Cambridge, because the cause of action is laid to be in a *close called Bl. Acre*, and it is *not averred* that it was *infra jurisdictionem*, cites Kelw. 33. a. 89. a. The judgment was entred, *ideo videtur*; and per Cur. judgment shall not be by a videtur. And judgment for those causes was reversed. Noy 129. Ventres v. Carter.

ought to be *ideo consideratum*, &c.

4. In assumpsit, &c. the defendant pleaded two several attachments of money in London, viz. of one part of it due to himself, and the rest to a stranger, and both due on bond. The plaintiff replied, that both the bonds on which the attachments were made, were executed *extra jurisdictionem*, &c. The defendant rejoined, that the bond made to him was executed *infra jurisdictionem*, &c. and upon a demurrer the plaintiff had judgment, because judgment *there of a thing out of their jurisdiction is absolutely void*, and *advantage may be taken thereof by pleading without a writ of error*; besides, the rejoinder answers only part of the replication. 3 Lev. 23. Pasch. 33 Car. 2. C. B. Frumpton v. Pettis.

5. *Assumpsit in London for depasturing of an horse in Essex*; the defendant pleaded in bar a former action brought in the sheriff's court in London for the same depasturing, and judgment there for the defendant. The plaintiff replied, that the cause of action did arise in Essex, out of the jurisdiction of the sheriff's court. Upon demurrer it was adjudged that the plea was ill; for if they hold plea of a matter out of the jurisdiction, the judgment is void, and cannot be executed. 3 Lev. 234. Mico v. Morris.

[33]

Carth. 494.
S. C. & S. P.
by Holt Ch.
J. in deli-

6. It was held in this case, per Holt Ch. J. that wherever a *new jurisdiction is erected by act of parliament and the court or judge*

judge that exercises this jurisdiction, acts as a court or judge of record according to the course of the common law, a writ of error lies on their judgments, but where they act in a summary method, or in a new course different from the common law, there a writ of error lies not, but a Certiorari. 1 Salk. 263. pl. 5. Trin. 12. W. 3. Groenvelt v. Burwell.

vering the
opinion of
the court.

(L. a. 9) Plea or Record remanded into the
Inferior Court. In what Cases.

1. **M**ORTDANCESTOR in Chester the tenant vouched foreigner to warranty, by which the record is removed into Banco, and there the tenant was effoined, and this effoin was quashed, by which the plea was remanded into Chester to take the assize. Br. Parol ou Plee remaund, pl. 5. cites 8 Aff. 22.

2. If foreigner be vouched in plea of land in the hustings in London, the plea shall be sent into Bank, and when the warranty is determined, it shall be remanded into London, and in this case Bank has no power to award seisin of the land, but only to try the warranty, and to remand it. Br. Parol ou Plee remaund, pl. 8. cites 43 E. 3. 1.

3. Formedon in London, the tenant vouched foreigner to warranty, by which the plea was sent into Bank, and process made against the vouchee, and at the day the tenant said that pending the process against the vouchee, it was found before the escheator, that J. N. held of the king, and dyed without heir, by which the king seized it, and gave to the tenant by patent, and prayed aid of the king; and because the tenant waved his voucher, and this court has no other power here but to determine the warranty, therefore they recorded the aid prayer, and remanded the parol into London. Br. Parol ou Plee remaund, pl. 9. cites 44. E. 3. 2, 3.

4. Fine came out of franchise into B. R. by writ of error, and no error found, by which the party sued execution there, and the bailiffs of the franchise where, &c. scilicet of Oxon. demanded co-nusance of it, and were ousted; for when the plea comes into B. R. it shall not be remanded. Br. Parol ou Plee remaund, pl. 6. cites 50 Aff. 9.

5. But if record be removed into C. B. out of ancient demesne by pretence of frank fee, and it is found no frank fee, it shall be remanded. Ibid.

6. If aid of the king be granted in assize for insufficient cause, yet when it is in the chancery, it shall not be remanded till the title of the king be examined for the king, otherwise upon a voucher, as it was said. Br. Parol ou Plee remaund, pl. 7. cites 8 H. 7. 11.

7. Where record comes out of county palatine or franchise, to
D 3

Br. Traverses
try de Office,

pl. 19. cites
S. C.

try a foreign voucher or foreign release, the record shall be remanded after trial of it. Br. Parol ou Plee remaund, pl. 4. cites 21 H.

Br. Traverse
de Office,
pl. 19. cites
S. C.

8. *Contrary where both courts are at common law*, as the *Chancery and B. R.* in case of a traverse, &c. or other issue joined in Chancery; for this shall be tried in B. R. and there shall remain, and there judgment shall be given. Ibid.

Br. Traverse
de Office,
pl. 19. cites
S. C.

* 9. *So of a record removed from C. B. into B. R. by writ of error, or otherwise*, quod nota. Ibid.

10. A man was *arrested by plaint in London*, and after the *defendant brought writ of debt in Bank*, and had writ of privilege, and because it appeared that the *plaint was elder than the writ*, the defendant was remanded into London, and the plaintiff in London had *Procedendo*, quod nota. Br. *Procedendo*, pl. 8. cites 8. E. 4. 18.

13. If a man is *arrested in London*, and after another brings *action in Bank against the same defendant by covin*, and has *capias* against him to have him removed out of London, and the plaintiff in London prays *procedendo* for the covin, he shall not have it till the day of the return of the *capias*, that the parties may be examined of the covin, quod nota; but if the *defendant does not come at the day*, &c. and is let to mainprize, the plaintiff may have a *new bill against him*, &c. and the cause why they surcease in London is, because the *capias* is a *superseas*, in itself; for by the arrest upon it, he is prisoner at the Bank, and not at London, and then they cannot proceed, and cannot have the prisoner, quod nota. Br. *Procedendo*, pl. 11. cites 10 E. 4. 16.

14. Where *plea of trespass*, which is in a court baron, of *damages under 40s.* is removed into Bank by *Recordare erronice*, where it ought not to be removed, there the base court cannot proceed, because the plea is removed, and therefore *Procedendo* ought to be awarded to them to proceed, per diverse serjeants, quod nemo negavit. Br. *Procedendo*. pl. 6. cites 14 H. 8. 15. 17.

Br. N. C.
31 H. 8. pl.
261. S. C.

15. If a man *arrested in franchise sues writ of privilege*, and removes the body and the cause, and after does not come to prove his cause of privilege, the plaintiff in the franchise cannot have *procedendo*, and therefore it seems that the *first sureties remain, contra if he had been dismissed by allowance of the privilege*, for then his sureties are discharged. But it seems that when they remove the body and the cause, they do not remove any sureties, but then there is not any record against them, and then it seems that the privilege being allowed, the sureties are discharged, contra where the privilege is not allowed; for then the prisoner and the cause was always remaining in the custody of those of the franchise. Br. *Procedendo*. pl. 13. cites 31 H. 8.

16. A *procedendo* is a writ to the judge of an inferior court, requiring him to proceed in a cause formerly removed hither by *certiorari*, or other writ, or stayed for some time by *superseas*. P. R. C. 294.

17. A procedendo was denied to be granted to the court of Canterbury in *ejusdem*; for per Cur. it was never known to have been granted in such action. Sid. 66. pl. 40. Mich. 13 Car. 2. B. R. Anon.

such places, such motions have always been denied. Sid. 231. pl. 31. Mich. 16 Car. 2. B. R. Anon.

18. An *indictment of barretry* being brought in B. R. and filed, it was moved to have a procedendo. Twisden J. said it could not be; for a record filed here, cannot be removed without act of parliament. But by the opinion of Foster and Windham, a procedendo was granted. *Quære de ceo.* Lev. 93. Hill. 14 and 15. Car. 2. B. R. Upham's case.

procedendo was awarded, against the opinion of Twisden J. and contrary to the course of the court. Sid. 108. The King v. Upton. S. C.—It was filed the same day that the certiorari was returned, which the court conceived an irregular surprise, notwithstanding the bar, and the clerks affirmed that none could issue. Keb. 470. The King and Justices of Somersetshire v. Upham, S. C.

19. Procedendo lies of course without motion for *not putting* [35] *in of bail.* Comb. 107. Pasch. 1. W. & M. in B. R. Anon.

20. It was moved, that if the *plaintiff in error* of a judgment in the county palatine of Chester, *does not return the record* in a short time, there might be a procedendo; but per Holt, we cannot grant a procedendo, because there is nothing before us; but upon a certificate that the record is not come in, you must have a *writ de executione judicii out of Chancery.* Comb. 422. Hill. 9 W. 3. B. R. Anon.

21. Upon a return of a hab. corp. from London, a by-law was set forth, laying a certain penalty upon a freeman, for selling goods not weighed at the city beam, according to the custom; and it was moved to file the return, for otherwise the defendant could have no remedy, if the return were false, and so they might return what custom they pleased false & impune. Holt Ch. J. held, that the practice had always been in B. R. to award a procedendo, without suing the return; but the question (he said) was, whether the filing would hinder the granting a procedendo? that it was true, that the *habeas corpus* * suspends all proceedings below, till the court has determined the right of the cause of detainer upon the return, and if they proceed in the mean time, it is *void, & coram non judice*; so that a procedendo was necessary, to untie their hands below. And said, he could see no reason, why they might not grant the procedendo after the return filed. 6 Mod. 177. Trin. 3 Ann. B. R. Fazakerly v. Baldo.

22. When a cause is removed by habeas corpus into B. R. a procedendo may be granted, though the return be filed; because the record is not removed, but only a transcript of it. Pasch. 6 Geo. B. R.

[For more as to inferior courts and proceedings there, see Certiorari. Customs. (I. 2) Habeas Corpus. And other proper titles.]

See 4 Inst.
229 cap. 45.
and Prynn's
Animadv.
on 4 Inst.
174 175

(M. a) Court of Stannaries.

[1. 33 E. 1. **R**OT. chartarum, membrana 8. parte 40, 41. *pro stannatoribus nostris in comitatibus Devonie & Cornubiæ, grant to them, &c. of their privileges, &c. all one except of the places of the prison, viz. l'Ostwithiel for Cornwal, & Lidford for Devon, and of the coinage, viz. l'Ostwithiel, Badmyn, Liskerret, Truro, & Helfton, in Cornubia.*]

[2. 33 E. 1. Libro parliamentorum 105. *ad petitionem stannatorum Cornubiæ, conceditur charta libertatum, juxta formam confirmationis regis Henrici, per se, non conjunctim cum stannatoribus Devonie, &c.*]

[3. 1. E. 2. Rotulo patentium, prima parte, membrana 13. *Concessio minerariis regis in comitatu Devonie commorantibus, quod ipsi a die consecutionis presentium per quadriennium proximo sequens completum, liberi sint & quieti in civitatibus, burgis, villis, mercatis, & aliis locis quibuscumque in comitatu Devonie predicto & aliis comitatibus vicinis de Theoleno & omnibus aliis consuetudinibus præstandis de quibuscumque necessariis pro victu & vestitu eorum minerariorum ibidem emendis. Et quod de transgressionibus, occasionebus personalibus, seu placitis aliquibus, alicubi in Curia Comitatum, Baronum, vel aliorum dominorum quorumcumque, toto tempore predicto, non placent, nec placentur, contra voluntatem suam, nisi coram custodibus nostris minere predictæ, & vicecomite nostro ejusdem comitatus, qui pro tempore fuerint. Vobis omnibus & singulis firmiter inhibentes, ne minerarios nostros predictos contra hanc concessionem nostram molestetis in aliquos, seu gravetis quominus ipsi quietantur & libertatibus predictis uti possunt, juxta formam concessionis ejusdem.*

[4. 4 H. 8. cap. 8. *Richard Strode imprisoned in Lidford, till he was delivered by a writ of privilege out of the king's exchequer at Westminster, for that he was one of the collectors in the said county for the first of the two fifteenths granted in this parliament.*]

[5. 23. H. 8. cap. 8. *If any person shall be sued, accused, indicted, imprisoned, amerced, condemned, or otherwise vexed or troubled in his person, lands, tyn-works, goods or chattles, by any of the ministers or officers of the king's courts of Stannary, &c.*]

[6. Hill. 35 E. 1. B. R. Rot. *Walter Wallings, a tinner, was indicted at Exeter before the justices itinerant, for killing Walter Wallings, the son of his brother in Decenna de Holme, and after it is there said, quod locus in quo interfectus fuit, fuit infra Libertatem Stannariæ, and after the defendant rendred himself to the sheriff of the county of Devon; and after Thomas de Swinsey, custos Stannariæ, came to the sheriff and required him to deliver the said defendant to him, upon which the sheriff delivered him to the said Thomas, by which the defendant was ductus ad gaolam de Lidford in Libertate ejusdem Stannariæ; and after it is said, quod defendens adhuc*

This is imperfect, and should be to this purpose, viz. "such suit as shall be void," &c.

adhuc est in Lidford, infra Libertatem prædictæ Stannariæ, and after it is demanded of the sheriff, wherefore he delivered the defendant to the said custos of the Stannary, (*) who said, that he demanded him by force of the said charter, 33 E. 1. upon which they were adjourned to Westminster coram Rege, and day given to the said custos, and to the defendant to answer it; but the custos did not come, but excused himself by sickness, and for the damage that might arise in the Stannaries by his absence; but the defendant appeared there, and pleaded not guilty, and was found not guilty.]

Fol. 548.

[7. 2 Ed. 3. Rotulo Patentium parte 1. Membrana 27. numero 130. upon the supplication of the tinner, the king granted, *that no tin shall be weighed at Tavistock, so quod multum distat a mari*, and so with great charge transported after coinage and weighing, and for this grievance it *should hereafter be weighed at Alsburton, Chagford, and Plympton*, and not at Tavistock. Apud Westmonasterium in Scaccario among the Eires de Cornubia. 5 Ed. 2. Rot. 6. apud Launceston, *William B. and G. T. are sued by writ of conspiracy by J. T. for appealing him of a robbery* 3 Ed. 2. &c. upon which comes *P. W. and shews the letters patents of 33 Ed. 1. which are entered in hæc verba*, and thereupon *P. W. demands consuance* of this plea, *for that the defendants sunt Stannatores*, to which the plaintiff *J. T. said*, quod prædicti stannatores Curiam suam habere non debent, quia dicit, quod ista sequela jam per 5 dies versus prædictos defendentes & alios continuata est, absque hoc quod prædictus *P. W.* vel aliquis alius eorum Ballivus, Curiam suam inde petiisset, vel cartam prædictam ostendisset. Dicit etiam, quod cum contineatur in dicta charta, quod prædicti stannatores operantes in dominicis regis, dum operantur in eisdem Stannariis, liberi esse debeant, & quieti de omnibus placitis & querelis Curias Regis tangentibus. Et cum prædictus *P. W.* afferit prædictos stannatores coram nullo justiciario regis, vel ministro, nisi coram eorum custode, non debere respondere, prædicti defendentes non sunt operantes in dominicis regis nec alibi operantes; & hoc offert verificare, prout, &c. proferet etiam quandam commissionem & quoddam breve regis, per quod quidem breve idem rex prædictis Willielmo B. & alius mandavit, quod, Thomam de la Hyde custodem Stannariæ regis prædictæ in socium admittant ipso Thoma tunc ibidem præsentem, & prædictam commissionem admittente; and the defendants being demanded whether they will answer, say, that not till it be determined whether they shall have their court; and the plaintiff demands judgment, as indefensum, upon which day is given over ad audiendum judicium, but nothing done in the roll.]

[37]

[8. The court of Trematon in Cornubia is not any Stannary court, for the stile of the court is, *Manerium de Trematon Curia Domini Regis ibidem tenta coram J. S. &c.* and a writ of error lies in B. R. upon a judgment there, and they may hold plea there of replevins. Co. Book of Entries, fol. 293. between *Walter Skelton, and John Starkey, and Nicholas Axford*, 15 El. Rot. 78.]

[9. If a suit be in the dutchy court of Calstock in Cornubia, touching a copyhold, and after a verdict, Mr. Coryton, the vicewarden,

warden, grants a mandate to the steward of the court not to give judgment, for that the defendant had petitioned him in point of equity, and a prohibition is granted, upon a surmise that the vice-warden had nothing to do as vice-warden in the dutchy courts; but there hath been a usage there to appeal to the lord warden as chief steward of the dutchy for matters of equity, and Mr. Coryton was only vice-warden of the Stannaries by his patent, and not deputy steward of the dutchy. Tr. 10 Car. B. R. between

a prohibition granted, upon the motion of master attorney general. Mich. 10 Car. B. R. between Adams and Hunn, per Curiam, a prohibition granted.]

10. The charter of the Stannary is, that the *king grants to the tinnners to dig tin in the waste lands and moors of the king and others whomsoever in the county of Cornwall. Br. Prerogative, pl. 134.*

11. By ancient charters, *the whole company and body of tynners, in every of the said counties of Devon and Cornwall, are cast and divided in four several Stannaries or jurisdictions: in every of which Stannaries, there is a court to minister justice in all causes personal arising between tinner and tinner, and between tinner and foreigner; and also for and concerning the right and ownership of tin mines and the disposition thereof, except in causes of land, life, and member; and if any false and unjust judgment be given in any of the said courts, the party grieved may make his appeal unto the lord warren of the Stannaries, who is their superior judge, both for law and equity; and from him, unto the body of the council of the lord prince, Duke of Cornwall, to which duke the Stannaries were given, as by the former charters have appeared, and from them the appeal lieth to the king's most royal person. Doderidge's Hist. of the Dutchy of Cornwall, 93, 94.*

12. When matters of moment concerning the state of those mines or Stannaries, shall come to be questioned or debated; *there are in every of the said counties, by the direction of the lord warden, several parliaments or general assemblies of the tinnners summoned, whereunto every Stannery within that county sendeth jurates or burgessees, by whose advice and consent, constitutions, orders and laws are made and ordained, touching tin-causes, which being promulged, the same do bind the whole body of tinnners of that county, as firmly as if the same had been established in the general parliaments of the realm. Doderidge's Hist. of the Dutchy of Cornwall. 94.*

[38] 13. As well blowers as all other *labourers and workers (without fraud or covine) in or about the Stanneries in Cornwall and Devon, are to have the privilege of the Stanneries, during the time that they do work there. Resolved by all the judges. Mich. 4. Jac. 4 Inft. 231.*

14. That *all matters and things concerning the Stanneries, or depending upon the same, are to be heard and determined in those courts according to the custom of the same, time out of mind of man used. Resolved by all the judges. Mich. 4 Jac. 4 Inft. 231.*

15. 3dly,

15. 3dly, That all transitory actions between tinner and tinner, or worker and worker, (though the cause be collateral, and not pertaining to the Stannery) may be heard and determined within the courts of the Stanneries according to the custom of the said courts, albeit the cause of action did rise in any place out of the Stanneries, if the defendant be found within the Stannery; or may be sued at the common law at the election of the plaintiff. Resolved by all the judges. Mich. 4 Jac. 4 Inst. 231.

16. But if the one party only be a tinner, or worker, and the cause of action being transitory and collateral to the Stannery, do rise out of the said Stanneries, then the defendant may by the custom and usage of those courts plead to the jurisdiction of the court, that the cause of action did arise out of the Stanneries, and the jurisdiction of those courts, which by the custom of the court he ought to plead in proper person upon oath. And if such plea to the jurisdiction be not allowed, then a prohibition in that case is to be granted. And if in that case the defendant do come to plead to the jurisdiction of the court upon his oath, he ought not to be arrested eundo, redeundo, vel morando, at the suit of any subject in any corporation, or other place where the said courts of the Stannery shall be then holden. Resolved by all the judges. Mich. 4 Jac. 4 Inst. 231.

17. 4thly, If the defendant may plead to the jurisdiction of the court in the case before mentioned; and will not, but pleads and admits the jurisdiction of the court, and judgment is given, and the body of the defendant taken in execution, the party cannot by law have any action of false imprisonment, but the execution is good by the custom of the said court. But if in that case it doth appear by the plaintiff's own shewing, that the contract or cause of action was made or did arise out of the Stanneries, and the jurisdiction of those courts, or if it appear by the condition of the bond whereupon the action is grounded, that the condition was to be performed in any place out of the jurisdiction of those courts, then all the proceedings in such cases upon such matter apparent, are coram non iudice. Resolved by all the judges. Mich. 4 Jac. 4 Inst. 231.

18. 5thly, We are of opinion, that no man ought to demur in that court, for want of form but only for substance of matter. Resolved by all the judges. Mich. 4 Jac. 4 Inst. 231.

19. 6thly, That the courts of the Stannery have not any jurisdiction for any cause of action that is local, rising out of the Stanneries. Resolved by all the judges. Mich. 4 Jac. 4 Inst. 231.

20. 7thly, That the privilege of the workers in the Stanneries do not extend to any cause of action that is local, rising out of the Stanneries, (for matters of life, member, and plea of land, are by express words excepted in their charters) and no man can be exempt from justice. Resolved by all the justices. Mich. 4 Jac. 4 Inst. 231.

21. Upon judgment given in the Stannery court, the course is, 1st. to appeal to the vice-warden. 2dly, From him to the warden, and after to the duke himself, (of Cornwall) when he hath had his livery;

livery; per Doderidge J. and Coke Ch. J. agreed with him herein, but before this, that he hath his liberty to appeal to the warden, and afterwards to the counsel; but *no writ of error lieth up n a judgment there given for any matter touching the Stanneries*; but upon a judgment there given upon collateral matters * a writ of error well lieth, and this hath been so before resolved, as the same is to be seen recorded in the Chancery, in the Petty Bag Office, by all the judges, upon a conference had. 3 Bulst. 183. Pasch. 14 Jac. in case of Langworthy v. Scott.

22. S. gave bond to deliver so much tin, made in the tin-work in Devonshire, at such a place within the jurisdiction of the Stannery. In debt upon the bond [brought in B. R.] the defendant pleaded to the jurisdiction of the court, because it was a tin cause. Montague Ch. J. said, it is alleged in the plea, that the defendant is a tinner, and this is not traversed, and puts the case, that if the condition was to deliver the tin at Bristol, whether the Stannery court should have jurisdiction there? implying, that it should not. But Doderidge said, the case is not so here, for it is to be delivered within the jurisdiction. The defendant shewed certain articles under the great seal, appointing and limiting the jurisdiction, wherein the article goes only to the cause, and not to the person. Doderidge J. said, the jurisdiction of the Stanneries had been debated before all the judges of England, and their charter of E. 1. and the statute of 50 E. 3. was shewn to them, and that both statute and charter were general, viz. as to the cause, and not restrained to the persons; yet, Montague Ch. J. at length ruled, that because the cause and the person are both privileged, the jurisdiction be allowed. 2 Roll. Rep. 44, 45. Trin. 16 Jac. B. R. Pinson v. Smale.

23. C. a minister in London, came into the Stannery court at the suit of L. and put in surety and then came again; it was shewn, that *neither the plaintiff nor defendant were tanners, nor the cause a Stannery cause*; whereupon C. was discharged, and then C. was immediately arrested again by L. and process awarded. An attachment was granted against L. and a prohibition to the court, for the defendant ought not to be arrested in coming to make his law. And Ley, Ch. J. said, that it was usual there after the oath made, for 3d. to enter the plaintiff a tinner. 2 Roll Rep. 379. Mich. 21 Jac. B. R. Lovice v. Clofe.

24. The jurisdiction of the Stanneries is only for tin matters, and where the persons which sue, or one of them, be a tinner; and all their proceedings there summarily and de plano, without any formal course, are illegal, and the king's courts shall take notice where they proceed irregularly, and shall controul them, and preserve the jurisdiction of the court; per Noy; and approved by the court. Cro. C. 333. pl. 19. Mich. 9. Car. B. R. Adams v. Ld. Warden of the Stanneries.

25. The custom in the Stanneries to try causes there by six jurors is a void custom; though in Wales, where it is confirmed by act of parliament, it is good. So a custom of the Stannery court

to take out execution both against body and goods is void. Sid. 233. pl. 36. Mich. 16 Car. 2. B. R. Aike v. Hunkin.

(N. a) Court. Jurisdiction of Court. Pleadings how.

1. **I**N *trespass*, at the distress the defendant was permitted to say, that the place is within the franchise of N. E. where the king's writ runs not, judgment of the writ, and was suffered to have the plea at the distress, and the writ abated by nient desire of the plaintiff. Br. Jurisdiction. pl. 9. cites 45 E. 3. 17.

2. He who pleads to the jurisdiction by the *cinque ports*, shall conclude judgment if the court will take conuance. Br. Jurisdiction. pl. 17. cites 49 E. 3. 24. [40]

3. Debt in London upon an obligation, the defendant pleaded, that it was made by *duress* in another county, by which it was awarded quod defendens eat sine die, & quod querens nihil capiat per querelam, and by all, this judgment does not go in bar, but to the jurisdiction, and such plea cannot be sent into bank to be tried and remanded as foreign voucher in London, for this is by statute which does not extend to personal actions. Br. Jurisdiction. pl. 83. cites 3 H. 4. 18.

4. Formedon of a *seignory, castle, and manor*. Newton said as to the *seignory and manor*, they are in the county of Carmarthen, and that the king and his progenitors, and all those whose estate &c. have had time out of mind, jurisdiction royal, Exchequer and justice in the same county, and writs sealed with the seal of the prince, and that those lands and all others in the same county have been pleaded within the same county, and not out, judgment of the writ, and admitted there that he may plead matter which goes to the jurisdiction, as here, and conclude to the writ. Br. Brief. pl. 165. cites 7 H. 6. 36.

5. *Trespass against T. C. Rolf* said he is Chancellor of Oxford, and King Henry 4 granted to J. D. Chancellor of Oxford, and his successors, that they should not be impleaded by writ of trespass, nor of contract of things which they do by their office, and shewed that he distressed the plaintiff by his office, judgment if the court will take conuance, per Babb. Ch. J. you ought to have demanded judgment of the writ. Br. Brief. pl. 169. cites 8 H. 6. 18. 19.

6. For those of London have privilege that they shall not be impleaded out of the city of his lands, and if writ be brought here of land in London, he shall plead this matter, and demand judgment of the writ, and not to the jurisdiction. Br. *ibid*.

7. If the plaintiff counts in debt or trespass, and the defendant pleads to the jurisdiction, the count shall not be entred before the jurisdiction be affirmed, and if continuance be taken till the next term, it shall be upon the writ as if no count had been, and at the next term the plaintiff shall count anew. Br. Count. pl. 36. cites 8 H. 6. 18.

8. In

8. In detinue of a charter, the *defendant defended tort & force, and no more*, and pleaded to the jurisdiction, because the *land in the charter is within the cinque ports*, and it was admitted a good defence, and therefore it seems that he *shall not make full defence*, if he will plead to the jurisdiction, but it was not adjudged if the plea be good to the jurisdiction in this case. Br. Jurisdiction. pl. 36. cites 7 H. 6. 22.

9. *Mortdantceftor*; the tenant pleaded to the jurisdiction, because the *land lies in another county, and the action is brought in C. B.* and demanded judgment if the court would take consuance; and per Moyle the plea is good, and shall not conclude to the writ, but to the jurisdiction, for another court ought to hold this plea, and not this court, and therefore well; contra where his plea proves that he ought to have other action in this court, but *this plea proves that this court shall not hold plea of this action, but another court.* Br. Jurisdiction. pl. 59. cites 38 H. 6. 18.

10. Pleadings to the jurisdiction are, 1st. Ancient demesne. 2dly, County palatine. 3dly, Cinque ports. 4thly, Foreign plea in personal actions. Brown's Anal. 3.

*[41]

+ Discussed Br. Jurisdiction, pl. 38. cites S. C. † Br. Jurisdiction, pl. 88. cites 22 H. 6. S. P. —It was said by Cooke prothonotary, that one cannot plead to the jurisdiction at all after any imparlance, tho' special; for the entry is *salvis exceptionibus*, &c. tam ad breve, quam ad narrationem, &c. (not said ad jurisdictionem curiæ.) Comb. 258. Pasch. 6 W. & M. in C. B. Denham v. Plumptre, and cites 3 H. 6. 30. a. 11 H. 6. 8. and 10 H. 6. 32.

¶ As where trespass is brought *vi & armis*, or where *freehold is pleaded in the County court, or court Baron*, for there the court ought to take consideration therein. Heath's Max. 21. cites 1 R. 8. 1.

‡ Pleas to the jurisdiction must always be pleaded *primo die*. Carth. 26. Pasch. 1 W. & M. in B. R. in case of Andrews v. Clerke.

11. Rules of pleading to the jurisdiction are, 1st. Plea to the jurisdiction *after the declaration*, shall not be entered till it be † dismissed, and the continuance shall be upon the writ. 2dly, This plea shall not be pleaded † *after a general*, but may after a *special, imparlance*, or * *Li. lo. salvis sibi omnibus &c.* 3dly. Upon the *view ancient demesne* may be pleaded to the jurisdiction. 4thly, A *foreign plea* may be pleaded to the jurisdiction in a *personal action*, but not in a real. 5thly, If one pleads to the jurisdiction, and *concludes to the action*, the jurisdiction is admitted, ¶ except in some special cases. 6thly, Every *castle in the cinque ports* is intended *guildable*, and not any member of the ports (49 E. 3. 34.) 7thly, The *Tower of London* is accounted in law to stand in the county of Middlesex. 8thly, The ¶ plea to the jurisdiction ought to be *pleaded at the first*, except in some special cases (as before.) 9thly, The *judgment* in these cases is, as in other pleas, that the writ shall abate. Brown's Anal. 3, 4.

Court. Jurisdiction. (O. a) Affirmed. By what.

1. **I**N formedon, the tenant said after the view that the land is in Wales, where the king's writ does not run, judgment of the writ, for he cannot have it to the jurisdiction, for he affirmed the

the jurisdiction by the view, by which the demandant replied. Br. Jurisdiction. pl. 37. cites 7 H. 6. 36.

2. And if the tenant pleads to the jurisdiction, and the demandant imparles, and the plea to the jurisdiction is not entred, the jurisdiction is affirmed; contra if it appears of record, by plea entred, that he has pleaded to the jurisdiction. Br. ibid.

3. The plaintiff declared in the Marshal's Court, upon an *infirmul computasset infra jurisdictionem &c.* and had judgment. It was objected, that the account doth not alter the duty; for that may arise in York, and that no other consideration be laid to intitle the court to any jurisdiction, the judgment ought not to stand; but it was adjudged, that the account was sufficient to give the court jurisdiction. 8 Mod. 77. Pasch. 8. Geo. 1723. Spackman v. Husley.

[For more of court in general, see Ancient Demesne, Chancery, Ecclesiastical Prohibition, University, and other proper titles.]

(A) Creditor. Favoured in Equity against the Debtor, and others claiming from him.

1. **CONVEYANCE** by *covin* does not divest the estate out of the debtor, feoffor &c. but he stands still seized as to the creditors, notwithstanding the feoffment. Hob. 72. pl. 86. *Humberton v. Howgill.*

Jenk. 295.
pl. 45. cites
12 Jac. S. C.
—Chan.
Rep. 131.
15 Car. 1.

Naylor v. Baldwin, S. P.

2. A judgment of a debt, and fine to a purchaser acknowledged all in one day, the judgment to be preferred. Toth. 180. cites 4 or 5 Car. *Owen v. Lady Deancourt.*

3. A debtor employed a creditor to purchase lands for him, and to take up money to pay for it, which he did, and took the purchase in his own name. The debtor sued in Chancery to have the lands on payment of the money, but the creditor having on other occasions mortgaged his own lands, and engaged for the debtor, Bridgman K. decreed, that in order to have a conveyance, the debtor should pay the debts as well as the purchase money. 2 Chan. Cases 87. cited per Finch, Chancellor, as the Case of *Bradburn v. Amand.*

4. A *settlement after marriage in pursuance of a bond or agreement before*, is good against creditors, as if made before, and is not a voluntary conveyance, nor fraudulent; agreed per Cur. 2 Keb. 700. pl. 52. Mich. 22 Car. 2. B. R. Lloyd v. Fox.

5. *Trustees by a settlement for payment of debts pretend, that they have not sufficient power to sell, and the heir pretends that he hath some statutes and securities which charge the lands, and so obstruct the sale, and the wife pretends that she has a jointure, but is willing to accept 2000l. in lieu of it.* Decreed, that all parties join, that the creditors may be satisfied, (excepting the jointure, which was prior to all the incumbrances, or to pay her 2000l. in lieu of it) and the debts to be satisfied in equal proportion, the trustees to be indemnified, and have their charges and allowances, and such securities, as the creditors respectively have, to be delivered up to the purchasers. Fin. R. 262. Trin. 28 Car. 2. Bennet v. Ingoldsby and Hampson.

6. Creditors, *not parties to a suit*, allowed six months time to come in and prove their debts before the master, paying their proportion of the charge of the suit to be ascertained by the master. and if they come not in as aforesaid, to be excluded. Fin. R. 358.

*[43]

But the reporter says quære; for it seems he was but tenant in tail of the inheritance, and so could not charge it by his will, unless it be intended he had still a power of doing it, lodged in him, by reason of the fine, notwithstanding he had declared, that after payment of the 1000l. it should go to the former uses. Ibid.

7. *One seized in tail of lands, whereof a term was in trustees to attend the inheritance, levies a fine, and by deed subjects the land to a debt of a 1000l. but declares, that after the debt is paid, the land to be to the old uses, and after devises the land for payment of all his debts; * it was decreed, that the lands are liable to the payment of the testator's debts in general.* Vern. 99, 100. Mich. 1682. Turner v. Gwynn.

Tenant in tail suffers a recovery to let in a mortgage of 500 years, and then limits the land to the old uses, and makes his will, and devises all his lands for payment of his debts. The court thought the equity of redemption should be assets to satisfy creditors, or a subsequent grantee of an annuity; Note, the redemption was limited to him, his heirs or assigns. Chan. Prec. 39. Hill. 1691. Foster v. Austin.

* Chan.

Cases, 257, Hill. 26 & 27 Car. 2. S. C. denied by Lord Keeper

8. Creditor shall be *relieved against a legatee*, said to be settled in the case of * Chamberlain v. Chamberlain. Vern. R. 92. Arg. Mich. 1682. in case of Noel v. Robinson; and Lord Chancellor said, it is certain that a creditor shall compel a legatee to refund.

Finch. — 2 Freem. Rep. pl. 37. S. C. but S. P. does not appear.

9. *A deed of trust was made for payment of such creditors as come in within a year; yet a creditor not coming in within the year, will not be excluded, but it is a continuing trust; but a bill may be exhibited after the year, to compel the creditors who stand out to come in, or renounce the benefit of the trust.* Vern. 260. pl. 253. Mich. 1684. Dunch v. Kent.

10. Creditors on judgments and bonds decreed to *redeem mortgages* towards satisfaction of their debts. 2 Chan. Rep. 396. 2 Jac. 2. Anon.

11. Action

11. Action of debt brought against an heir upon the bond of his ancestor, who pleads a false plea, and the plaintiff has a verdict; the defendant dies before the day in bank, and devises his lands to Y. S. The obligee brings a bill against the devisee to be paid his debt. Lord Chancellor said, there is no colour of equity in this case, unless you will have it that the defendant died maliciously before the day in bank, on purpose to defeat the plaintiff of his debt, and dismissed the bill. Vern. 400, 401. pl. 373. Pasch. 1686. Holley v. Weedon.

a Chan. Ca. for 178 S.C. and bill dismissed

12. A tenant for life was outlawed, and absconded; B. purchases his estate. Jeffries C. set aside the purchase in favour of creditors, the purchase being made at an under value, and pending the prosecution at law against him, and having notice thereof. Vern. 465. pl. 448. Trin. 1687. Hern v. Meers.

13. Executor makes a voluntary assignment of part of the assets; it was strongly insisted for the plaintiff, that he being a creditor to the first testator, might follow the estate, in whole hands soever it came, and ought not to be put to the charge and trouble of controverting the account directed by the court to be taken. Sed non allocatur. Per Jeffries C. 2 Vern. 75. Trin. 1688. Stiddolph v. Leigh.

Arg. Vern. 92. in case of Noel v. Robinson, cited S. C. — Where the executor fraudulently sold a term to one

that contrived and consented to the devastavit, a creditor by bond was allowed to follow the estate in the hands of the purchaser. Decreed at the Rolls, and affirmed by Ld. Cowper. 2 Vern. 616. Crane v. Drake. — S. C. cited and agreed by Ld. Hardwick, 13 November, 1738. who said, that he had examined the register book, and that there the decree was founded upon particular proof of fraud, which Mr. Vernon's Report does not plainly and fully set forth in case of Nugent v. Gifford, and decreed accordingly, notwithstanding it was insisted that notice was not expressly given to the purchaser.

14. The son is surety for the father to several persons by bond, and the father enters into statute to indemnify the surety, and pay the debts. Afterwards, at the instance of the father, one of the creditors exchanges his bond for a mortgage from the father. The son extended the lands mortgaged, pretending he was damaged. Several of the debts to be paid were the debts of the son. Decreed, that the mortgage be redeemed, or foreclosed, and a perpetual injunction against the statute. 2 Vern. 39. 1 Hill. 1688. Legriell and Moriscoe v. Barker. [44]

15. Lands were settled by the parliament for the payment of C's debts. The trustees brought a bill against the administrators of C. to discover the personal estate, &c. And the administrators (who were administrators as creditors to C.) with three or four of the creditors, bring a bill against the trustees; and it was decreed, that they shall sell, &c. and that all creditors may come in by a time, contributing to the charges, &c. and now the plaintiffs (as other creditors) exhibit their bill against the administrators, and against the trustees, to discover the personal estate, and to have the lands sold, &c. The defendants objected, that the plaintiffs ought not to have exhibited a new bill, but should, by motion to the court, come in as creditors upon the former bill exhibited by the administrators. But the court over-ruled it, and said this bill was well brought, because it calls the administrators themselves to

an account, which could not be upon the former bill. 3. *Chanc. Rep.* 216. Pasch. 1688. *Gwevers v. Danby (Earl of) & al.*

*2 Vern. 763.
Mich. 1718.
Wilson v.
Fielding,
S. P. de-
creed.*

16. Where a judgment creditor levied his debt out of the personal estate, the court inclined to relieve a bond-creditor, and to place him in the stead of the judgment-creditor, and charge the land with his debt. 2 *Vern.* 182. pl. 164. *Mich.* 1690. *Porey v. Marsh.*

17. Lands on marriage were settled on daughters, and their heirs, till 3000l. be paid by the next remainder-man. Decreed at the rolls and affirmed on appeal by Cowper K. that judgment-creditors should redeem the daughters who had entered on the estate, but that on the daughters account of profits, the surplus should not annually go to sink the principal, but only as an entire sum of 1000l. was raised, and so on, not till another 1000l. was raised. 2 *Vern.* 523. *Mich.* 1705, and 578. *Hill.* 1706. *Blagrove & al. v. Clun. & al.*

17. Marriage covenant to purchase and settle lands of 400l. per ann. to Baron for life, then to the feme for life, remainder to the heirs of their two bodies, and if he dyed, no settlement made, the wife may elect to have either 400l. per ann. or 3000l. in money, in lieu of dower and thirds. Baron dies before a settlement made; the court, in favour of creditors, will not allow the wife to elect the 3000l. in money, and the children to have 400l. per ann. settled on them after her decease, and so to exhaust the assets, but decreed a settlement of 400l. per ann. on the wife for life, remainder to the children. 2 *Vern. R.* 605. pl. 543. *Hill.* 1707. *Hancock v. Hancock.*

18. 4000l. was put into trustees hands upon the marriage of Dr. Fulham with Mrs. Evelin, to be laid out in lands to be settled upon the husband for life, remainder to the wife for life for her jointure, remainder to the first and every other son of the marriage in tail male, remainder to the heirs of the body of Dr. Fulham, remainder to his right heirs in fee; the wife dies, leaving issue a son, and after the husband dies, before the money was laid out in land, and devises all his estate, both real and personal, to trustees during the minority of his son, for the benefit of his son, and in case he dies before the age of 21, then he gives several legacies, and the residue of his personal estate to charitable uses, &c. The son died before the age of 21. Creditors bring a bill against Dr. Fulham's executor and his brother, who claims the 4000l. as real estate, and not subject to debts by simple contract, suggesting, that there are not personal assets enough to pay Dr. Fulham's debts, without the 4000l. be taken as money, there being no issue left of the marriage, and the whole would have vested in Dr. Fulham, if he had outlived his son, &c. and the consideration of the marriage agreement extends no further than the issue of the marriage, and not to the general heir of the husband, &c.

[45]

Mr. Vernon, for defendant, who was uncle and heir at law to the son of Dr. Fulham, and claims the 4000l. as real estate descended to him, cited the case of *Whittick v. Jermin*, tempore Hale Ch. B. which was the first case where trust money to be laid out in

in lands was held to be real estate. *Atkins v. Atkins*, tempore Jefferys C. such trust money shall be taken as real estate, and shall go to the heir, and not to the executor, though the articles be silent as to the remainder in fee, and the limitation of the articles went no further than to the issue of the marriage. So a wife shall have dower of such trust money, and a husband shall be tenant by the curtesy, &c.

Per Harcourt C. I shall not give my opinion now if the 4000l. agreed to be laid out in land by the marriage articles, shall be taken in equity to be real estate against the creditors by simple contract for the benefit of a collateral heir at law, but refer the account of the personal estate of Dr. Fulham to the master, to see if that be sufficient to pay the debts by simple contract; for if so, then this point cannot come in question. I do not think the cases cited come up to this case; the first case was in favour of the issue of the marriage, and not for a collateral heir; and in the second case, the dispute was between the heir and the executors, but not of creditors; so in dower, and by the curtesy, it has only been carried against executors, and that does not come up to the case of creditors. *Mss. Rep. 13 July, 13 Ann. Fulham v. Jones & al.*

20. *Bill by a judgment creditor to open a decree of foreclosure, to which suit he was not a party, suggesting fraud and contrivance between the mortgagor and mortgagee thereby to cheat him of his debt.* The mortgagee pleaded the decree of foreclosure and purchase of the equity of redemption, and by answer denies the fraud, but admits he had notice of the judgment when he brought his bill to foreclose, but did not know the person who had got the judgment, nor where to find him, and for that reason did not make him a party to the suit. The mortgagor, by his answer, admits the mortgagee, but says, he was in prison at the time of the foreclosure; but owns he employed a solicitor to appear for him, &c. He says, that being very poor and necessitous, and in prison, he was prevailed on to assign his equity of redemption for 20 guineas, though the estate is worth a great deal more. Per Cowper C. since the mortgagee had notice of the judgment before the foreclosure and purchase of the equity of redemption, the plaintiff may go before the master, and be at liberty to surcharge or falsify the mortgagee's account; but the mortgagee is not to account for the profits since the decree of foreclosure, and the plaintiff being a judgment-creditor, and not a party to the bill of foreclosure, may redeem. Note, in this case, the plaintiff being an obscure person, was ordered to give security to answer costs, in case he did not redeem. *Mss. Rep. Mich. 2 Geo. in Canc. Bird v. Gandy & al.*

21. *A jointure was made after marriage in bar of dower, by the husband, of lands which were then his father's, and the father joined therein; but it was not to take effect till after his father's death, as the statute requires. Afterwards the husband devised his lands for payment of debts, and died, leaving the father, and then the creditors bring a bill, and the wife would waive the jointure, and claim dower, and after such her answer put in, the father died. But Parker C. seeing that by waving the settlement, the*

Creditor and Debtor.

lands would go to the heir at law not subject to the payment of debts, since it *was never part of the testator's estate, the father out-living him*, and so the assets would fall short, and that what the wife did was in favour of the heir at law, to the * prejudice of the creditors, he decreed, that she should take the estate for her life, but that she should *assign it over in trust for the creditors, who should convey to her a third part of her husband's lands for her dower*, free from incumbrances. 10 Mod. 487. Pasch. 8 Geo. 1. Mills v. Eden.

22. A. seized in fee and indebted to several by bonds, in which his heirs were bound, devised his lands to A. for life, remainder to his first, &c. sons in tail, remainder over. Lord C. Macclesfield decreed a sale, though there was no devise of the land for payment of debts. 2 Wms's Rep. 234 Trin. 1724. Manaton v. Manaton.

23. Where debts by specialty, and which are a lien at law on the real estate, are paid out of the personal estate by executors in ease of the lands, the creditors by simple contract shall stand in the places of the creditors by specialty to have their debts satisfied out of the lands, and decreed the lands to be sold for that purpose, and the heir, who was an infant, to join in a conveyance within six months after he comes of age. 9 Mod. 151. Trin. 11 Geo. 1. in Canc. Charles & al' v. Andrews.

§ Vern. 306. in pl. 295. Mich. 1693. Arg. cites the case of Knight v. Keyne, where the personal estate was applied in prejudice of a bond-creditor to satisfy a statute which bound the lands, and the bond could not affect them, and adds, that the court usually marshals the assets, so as all creditors may have a satisfaction, but never to prevent any creditor from obtaining satisfaction of his debt, nor a purchaser from protecting his purchase.

24. A legacy of 1000l. was bequeathed to a feme sole infant, charged upon land, and payable at 25. She took husband, who assigned the same, during her infancy, to W. in consideration of 750l. and afterwards she attained her age of 25. It was insisted against this assignment, that it was made for less money than was really due, viz. 750l. instead of 1000l. But it was answered, that the interest of the 750l. from the time it was paid to the attaining 25, and the hazard of her dying before that age, made it a dear bargain, and that with regard to any judgment or other creditors of the husband, as they claimed under him, and had no specific lien on the legacy, they could not be in a better condition than he himself was; and Ld. Chancellor decreed the assignment good, and that W. was intitled thereto with interest from the wife's attaining the age of 25. 2 Wms's Rep. (603.) (609.) Trin. 1731. Duke of Chandos v. Talbot.

25. Where there are proper persons to get in the estate of another, Chancery will not suffer the creditors of the testator to bring a bill in equity in order to get in that estate; but if the executors will collude with a debtor, there is no doubt but a creditor may bring his bill, in order to take care of the estate, and charge the executors with such collusion; per Parker J. who sat for the Lord Chancellor. Barnard. Rep. in Canc. 32. Pasch 1740. Franklin v. Fern.

(B) Agreements

(B) Agreements between Debtor and Creditor.
How far good and binding.

1. **D**EBTOR agreed with his creditors to assign all his estate on oath, to persons in trust, for payment of his debts, and such allowance to himself; most of the creditors signed. Debtor imbezzled some of the goods, on which some of those that signed took out a statute of bankrupts. The debtor filed his bill, but no relief. Chan. Cases 18. Hill. 14 & 15 Car. 2. Fuller v. Lance. [47]

2. All the creditors of A. except I. S. agreed to accept 5s. in the pound, and to take A's bond for the same, and I. S. promised to do so too, but instead thereof, brought an action for the whole debt. On a bill by A. suggesting as aforesaid I. S. insisted that the plaintiff is able to pay the whole, denies the agreement as set forth, and that if he did promise to come into any composition, it was to be paid 5s. in the pound ready money, and 15s. more in seven years, and the court dismissed the bill as not proper for relief. Fin. R. 332. Mich. 29. Car. 2. Davis v. Legelder.

3. A creditor agrees to take less than his debt, so as the money is paid at a certain day; if debtor fails at the day, the creditor is not bound by the agreement. Vern. R. 210. pl. 208. Mich. 1683. Sewell v. Muffon. See Chan. Cases 110. Delamere v. Smith.

4. Creditors, fearing want of assets, made a composition with the executor of debtor; afterwards assets came in; though the executor was willing to pay the whole, yet on a bill by the residuary legatee for an account, and to have the benefit of the surplus, Lord Chancellor said he could not set aside the composition the creditors had made. They have no bill for the purpose and only come in before the master, and therefore they must abide by the composition. Chan. Prec. 99. 100. pl. 68. Mich. 1699. Lord Castleton v. Lord Fanshaw.

5. A. an executor and devisee, being decreed a trustee, was ordered to account, and, on account, was reported to be indebted to B. the cestui que trust, in 4000l. The decree was affirmed in the House of Lords. Afterwards A. went beyond sea, and being there, a composition was made, by which A. was to pay a small sum to B. and B. was to indemnify A. from the creditors of the testator. A. being threatened with suits by some of testator's creditors brought a bill against B. to indemnify him. And Ld. C. Macclesfield decreed accordingly, and said, that all that equity ought to guard against, is that no fraud be used in obtaining the composition, and took notice, that there had been a fair representation on the part of A. and a just compliance by B. the defendant, and in a great measure executed by A. and therefore ordered B. to execute his part of the agreement, and indemnify the plaintiff against the debts of the testator. Williams Rep. 751. Mich. 1721. Pollen v. Sir John Hubard.

6. The court of *chancery* with consent of the wife and her trustees, who had about 5 or 6000*l.* portion of hers in their hands, in order to compound with the husband's creditors, *ordered part of the trust money to be paid to the creditors in discharge of the husband's debts*, some of the creditors at executing the deed of composition *took private securities possidated, &c.* The master of the rolls thought this under-hand dealing a fraud on the wife, on the trustees, and the court, and therefore directed all such securities to be set aside and delivered up to the husband. Wms's Rep. 768. Mich. 1721. Middleton v. Lord Onslow & al'.

[48] (C) Where a Debtor may prefer one Creditor to another, or what Creditors shall have the Preference.

Judgment shall be paid before statutes or recognizances. Brownl. 77. Hill 11 Jac. Hancock v. Wrenham.

1. A **STATUTE** first acknowledged shall be preferred before a judgment obtained afterwards. Brownl. 37. and *vice versa*. If nothing be done by the sheriff on the extent, and if the land be first executed on the statute, and afterwards an *elegit* upon a judgment obtained, before the acknowledging of the statute come also to the sheriff, the moiety of the land extended shall be delivered to the plaintiff on the judgment. Brownl. 38.

—It was admitted, that a prior statute *extended* shall not be avoided by a subsequent judgment, as in the case of *Fuller v. Guilmore*, but that was in the case of a *freehold*, and not as to goods and *chattels*. Vern. 294. Hill. 1684. in case of *Morgan v. Ld. Sherard*.

S. C. N. Ch. R. 183.

2. A mortgage was made by feoffment without livery, yet this *defective mortgage* is a charge on the lands in equity, and the mortgagor and his heirs are but trustees for the mortgagee, and judgments confessed by the heir on bonds of his ancestor (the mortgagor) shall not take place of the mortgagee. Fin. R. 28 Mich. 25 Car. 2. Burgh v. Francis.

3. A. is indebted by bond (in which I. S. is bound as surety) and also by simple contract to B.; A. states an account of both debts with B. and makes a bill of sale for the securing the balance which proves deficient; on a bill by the surety decreed, the money arising by the bill of sale should be applied towards both debts in proportion. Vern. 34. Hill. 1681. Perris v. Roberts.

4. Recognizance was inrolled by special order of the court after lapse of time for the doing it, by which the recognizance is effectual from the date. A. between the date and the enrollment lent money to the cognizor and took a judgment, which now was over-reached by the recognizance; the estate was in mortgage, and neither the judgment or recognizance could reach it without aid in equity, the cognizor having only an equity of redemption in him. The court inclined to prefer the judgment creditor that he might not complain of wrong done him by the order for inrolling the recognizance. 2 Vern. R. 234. Trin. 1691. Fothergill v. Kendrick.

5. A. is tenant for life, subject to a mortgage of 15000l. to B. remainder to J. S. in fee. A. acknowledges a statute to C. for 500l. and afterwards A. sells his estate for life to I. S. for 3000l. who had no notice of the statute to C. The 3000l. was borrowed by I. S. of D. who likewise paid off the 15000l. and took an assignment of the mortgage for the 15000l. and also charged with the 3000l. and I. S. covenanted to pay the money, and the equity of redemption is limited to him; and D. covenanted on payment to assign to I. S. or as he would direct. I. S. acknowledged a statute to E. who had no notice of the 500l. statute to C. and after devises the lands to A. and charged with debts and legacies. Decreed that B. must come in last of all, even after debts and legacies, and affirmed by Lord Wright assisted by two judges, and said it was like the case of a third mortgagor buying in a first. Ch. Prec. 158. pl. 131. Pasch. 1701. *Blake v. Hungerford*.

6. A. seized in fee, in 1679, mortgaged for 500 years, and in 1687, the term being kept on foot and assigned to B. C. and D. B. lends 1000l. to A. on a judgment, and in 1688, A. borrows 1500l. of E. for securing whereof A. and C. one of the trustees assign the term of 500 years to E. B. having notice of this assignment, B. D. and A. assign to I. S. in trust for B. Per Wright K. though there is a term attendant on the inheritance, yet a judgment is an equitable lien on the inheritance and consequently affects the term; and therefore B. having got the legal estate as to two thirds of the term in I. S. in trust for herself, shall have the benefit of it, though she had notice of the mortgage and assignment by A. and C. And all mesne incumbrances from 79 were postponed to the debt to B. and E. 2 Vern. 524. pl. 474. Mich. 1705. *Bristol (Earl) & al' creditors of Sir William Basset v. Hungerford & al.*

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7. Decreed at the rolls that mortgages were to be paid first, and then judgments, and then recognizances, &c. But upon appeal to the lords, it was adjudged, that mortgages were not to be preferred before other real incumbrances; but mortgages, judgments, statutes, and recognizances, should take place according to priority, and as they stood in order of time. 2 Vern. 525. pl. 474. Mich. 1705. *E. of Bristol & al' creditors of Sir William Basset v. Hungerford*.

8. An incumbrance by judgment being a lien on the land, if made prior to the grant of an annuity, shall be preferred before the grant of the annuity, because his charge on the land is posterior. Gilb. Equ. Rep. 66. per Lord Chancellor. Pasch. 7. Ann. in Canc. in that of *Davison v. Goddard*.

9. A. a freeman of London by will gives his own third part of his personal estate to M. his wife, and the other two thirds to his children, and dies, leaving two daughters B. and C. Afterwards M. possessed herself of the whole stock and carried on the trade, and some time after married J. S. who employed the whole stock in trade likewise, and made no distribution to the children. C. dies; on a treaty of marriage between W. R. and B. a computation was made of what B's fortune might amount to, but it falling short

Gilb. Equ. Rep. 32. S. C. in totidem verbis.

Creditor and Debtor.

of what W. R. expected, and the match thereupon falling off, J. S. agreed by parol to make her fortune 4000l. and paid 2500l. of it. J. S. afterwards died indebted to several other persons, but made a will and entered into a bond to W. R. for payment of the 1500l. but kept the bond himself, though in his sickness he showed it to W. R. The agreement by J. S. to pay the portion, and the execution of the bond was proved. But Lord Harcourt thought the bond made so long after the marriage as four years, could not be tacked to the agreement, so as to make it any evidence in writing of that agreement; especially on the circumstances that the bond was then made without any application of W. R. and B. and was not delivered into his or her custody, and that it being made at the time the will was, and shewn to them with his will, and after his death found with his will, he looked on it only in nature of a legacy, and voluntary, as against his own creditors, and to be postponed to them. Ch. Prec. 372. pl. 259. Trin. 1713. Leoffes v. Lewen.

10. Private act of parliament for sale of Lord Stawell's estate and directed that the money arising by sale should first go to pay off mortgages, and then statutes, judgments, and recognizances, with a saving to all but the family of Lord Stawell; decreed in pursuance of this act, that subsequent mortgages should be paid before judgments precedent but seemed to admit that by virtue of the general saving in the act, they might make use of their incumbrances as they could at law; per Cowper C. 2 Vern. 711. pl. 633. Hill. 1715. Ward & al'. v. Cecil & al'.

[30] 11. A. recognizance not inrolled, decreed per Cowper C. to be considered as a bond. 2 Vern. 750. Hill. 1716. Bothomly & al' v. Lord Fairfax.

A recognizance is a judgment, and wants nothing but execution to make it a complete judgment; per Powell J. Farr 8. Pascht 1 Ann B. R. in case of Atwood v. Burr. — Litt. Rep. Arg. 89. Trin. 4 Car. in the Exchequer, in case of Melvin v. Reeve.

Wms's Rep. 334. to 340. 12, Though the court may permit the inrollment of a recognizance after the time is elapsed; yet it is always to be done with caution that it may not prejudice any intervening purchaser, and the statute of frauds and perjuries provides that judgments shan't, by having relation to the first day of the term, bind purchasers nor affect the land, but from the time of signing them in the margin; but says nothing as to recognizances and pocket securities, which are more dangerous to purchasers, and it may fairly be presumed that the debt was otherwise satisfied or secured when the recognizance was not inrolled. 2 Vern. 750. Hill. 1716. Bothomly v. Fairfax.



(D) In what Cases, where the Creditor is supplanted of his Security, a Court of Equity will substitute other Security in its Room.

1. **A.** INDEBTED to B. in 260l. assigns over to B. the benefit of a decree against C. afterwards A. agreed with C. to release to him all benefit of the decree, and all suits and demands, B. brought his bill to set aside the release, C. pleads the release for a valuable consideration, and that he had no notice. The court allowed the plea, and there being several securities mentioned in the release, as made over by C. to A. in consideration of such release, decreed those securities to be made good to the plaintiff B. to enable him to receive satisfaction for the 260l. and A. and C. to covenant not to release such securities till B. is satisfied. Fin. R. 218. Trin. 27 Car. 2. *Hookes v. Simball.*

2. A debt owing to the king, was ordered to be satisfied out of the real estate, that the other creditors might be let in to have a satisfaction of their debts out of the personal assets. Vern. 455, pl. 427. Pasch. 1687. *Sagittary v. Hide.*

3. A. was indebted 1000l. by mortgage, and 500l. by bond; A. before his death makes a lease of lands to trustees, for payment of his debts, worth about 1200l. The heir of A. after his death sells as much lands as pays 1400l. whereof the mortgage was part, (which was more than the value of the trust estate). The creditor for the other 100l. brought his bill against the heir, and the trustees, to have his debt satisfied out of this trust estate. It was insisted for the heir, that having paid as far as the value of the trust estate did extend, he ought not to have his lands charged any farther. But it was ruled, that since the trust lands were not sufficient to satisfy the whole debt, the heir, and the trustees, and the mortgagee should not juggle together to cheat other creditors, by paying the mortgage first off; but on the contrary, the trust lands should be applied in the first place for the other debts, because the mortgagee could be at no damage, being secured by this mortgage; but on the contrary, if the mortgage should be first satisfied, the other creditors should be satisfied, the other creditors might lose their debts; and so the plaintiff in this case had relief for his debt. [51]
2 Freem. Rep. 51, pl. 56. Pasch. 1680. *Poyve's case.*

4. T. S. entered in a bond, wherein he bound himself and his heirs to pay 100l. within six months after his death to A. and became indebted to B. in 45l. by simple contract, and died intestate, not leaving personal assets sufficient to pay his debts; the defendant was his son and heir, and had real assets from him by descent of the value of 100l. and he took out administration to his father; and six days before the 100l. became due, by the condition of the bond, agrees with the obligee to convey the freehold lands descended to him in satisfaction of the bond, and the conveyances were drawn and ingrossed accordingly; but before the execution of them, he gives

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gives the obligee 30s. to have the consideration of the deed razed out, and made to be for so much money paid instead of delivery up of the bond; but no money was paid, but only the bond delivered up; B. demanding his debt, he insisted he had paid the bond out of the personal assets, and had none left to pay him; whereupon he brought this bill, and the defendant insisted, that he being both heir and administrator, had the liberty to pay the debt out of what assets he pleased; that he had not paid the bond out of the real assets, nor ever intended so to do, but upon the whole matter the court declared the bond to be well paid out of the real assets, and decreed the debt and costs out of the personal assets. *Abr. Equ. Cases, 144. pl. 21. Hill. 1695. Neave v. Alderton.*

5. The plaintiff lent a sum of money on the mortgage of some houses, and had a bond for payment of the money, as usual in such cases; afterwards he lent a further sum of 2000l. on the equity of redemption, and had a bond for that likewise; afterwards the mortgagor becomes a bankrupt, and by some accident the value of the houses sunk so much, that they were not sufficient to raise the mortgage money first lent; and on a bill brought to have them sold, and that as so much as they fell short to answer the first mortgage money, the mortgagee might come in upon his bond as a creditor; it was so decreed; and as to the 2000l. lent upon the equity, which was worth nothing, it must stand singly upon the bond. *Abr. Equ. Cases 312. pl. 9. Pasch. 1695. Wiseman v. Carbonell.*

*Gillb. Equ.
Rep. 110.
Mich. 1
Geo. 1. S.C.
in totidem
verbis.*

6. A man borrows a sum of money on the mortgage of a ship, and covenants, that whatever money the mortgagee should advance for insurance of the ship in a voyage she was then about to make, that he would repay it, but there was no covenant for re-payment of the principal money itself; the mortgagee insures the ship, and the mortgagor repaid him that money; then the ship proceeds on her voyage, and returns home; and being afterwards to go out on another voyage, the mortgagee treated with another person concerning the insurance, but could not agree for the rate, and thereupon the ship went out and was lost in the voyage, and now between the mortgagee and the executors of the mortgagor, the question was, whether the mortgagee should come in for his principal money as a creditor, by simple contract; and it was argued that he ought not, because there was no covenant for payment of the mortgage money, so that he must be supposed to rest himself on the ship only for his security, and that being lost, so is his money too; but on the other side it was argued, that if he had taken no security at all for his money, he had then, without question, been a creditor by simple contract; and surely the taking security ought not to put him in a worse condition, especially now, that the security being lost and gone, his debt rests wholly on the simple contract; and of the same opinion was my Lord Chancellor Harcourt, and pronounced this decree accordingly. *Abr. Equ. Cases, 139. pl. 5. 1713. Thomas v. Terry.*

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7. S. having several young children, and being much in debt conveyed part of his lands in trust for the payment of his debts, and by

by another deed conveyed other part to trustees for the maintenance of his children. This last conveyance being voluntary, was declared void as to creditors, and still liable to their demands as before, but it was good against S. himself, and should bind him, and therefore if his creditors should fall upon those lands for a satisfaction of their debts, and thereby strip the children of their maintenance, the children should have a recompence out of the residue of the estate, which S. had reserved to himself for his own maintenance, and compared it to the case where creditors that have a lien upon the land take their satisfaction out of the personal estate, which was liable to other creditors of an inferior nature, who have no lien upon the land, these creditors in equity shall stand in the place of the other creditors who had a lien upon the land, and have a satisfaction out of that in their stead; this case is the same; for though the conveyance was voluntary in the father, yet he is bound by nature to provide for his children, and it is a sort of a debt. Per Ld. C. Cowper MS. Rep. Mich. 4. Geo. Canc. Sneed & al' v. Ld. and Lady Culpepper. & c contra.

8. Where a person indebted by specialties and simple contract dies, and leaves both a personal and real estate, this court will not suffer the debts by specialty to be flung upon the personal estate, and that being exhausted leave the debts by simple contract unsatisfied, the land not being liable to pay them, but will decree the debts by specialty to be satisfied out of the land, and the debts by simple contract out of the personal estate. Per Parker C. 10 Mod. 462; Mich. 6 Geo. 1. in Canc. in case of Blundell v. Barker.

S. P. per
King C. 10
Mod. 489.
in case of
Mills v.
Eden.

(E) Creditors. Disputes inter se.

1. CREDITORS having recovered at law and received the money, and given releases, chancery will not afterwards compel them to take their proportionable shares, but dismissed a cross bill brought for that purpose. 2 Ch. Rep. 178. 31 Car. 2. Tucker v. Searle.

2. Bill by a conusee of a statute of the mortgagor to redeem, after a decree of foreclosure, &c. The defendant pleads the decree of foreclosure, and that the statute was acknowledged after the mortgagor's bill filed, that the mortgagee had no notice, and made proper parties at the filing of the bill, and that the present plaintiff took the security pendente lite. Mr. Vernon said, that if an incumbrancer lies by, and suffers the mortgagee to obtain a decree of foreclosure, though he is not bound by the decree, because not made a party, yet, if he afterwards brings a bill to redeem, he shall not be at liberty to except to the accounts stated by the master, but shall pay the whole upon his redemption. Per Harcourt C. This is a recent foreclosure, let the plaintiff redeem upon payment of what is due, with costs. MS. Rep. 9 July, 13 Ann. in Canc. Crisp v. Heath.

3. A. mortgages to B. for a term of years, to secure the sum of already lent to the mortgagor, as also such other sums as should

Creditor and Debtor.

should hereafter be lent or advanced to him. Afterwards A. makes a second mortgage to C. for a certain sum, with notice of the first mortgage, and then the first mortgagee having notice of the second mortgage, lends a further sum, &c. The question was, upon what terms the second mortgagee shall redeem the first mortgage. Per Cowper C. the second mortgagee shall not redeem the first mortgage, without paying all that is due, as well the money lent after, as that lent before the second mortgage was made; for it was the folly of the second mortgagee with notice to take such a security. But upon the importunity of the counsel, it was ordered, that the master should report what money was lent by the first mortgagee, after he had notice of the second mortgage. MS. Rep. Paich. 2 Geo. in Canc. Gordon v. Graham.

4. A bill was brought for a seal of defendant Fletcher's estate, for satisfaction of creditors by mortgages and judgments. One Mr. Curwin, a papist protest, had a mortgage for 2400l. upon the estate prior to the plaintiff's mortgage, he had also a judgment, but that was subsequent to the plaintiff's mortgage and to several other judgments, and to other creditors, and the question was among the creditors, who should have the priority in payment, &c. the estate not being sufficient to pay off all the mortgages and judgments.

Per Parker C. *The mortgage to Curwin being a papist protest is void by the statute of W. 3. for that is an interest in lands, but as to the judgment, though a papist can't take out an elegit, for that gives an interest in the moiety of the debtor's lands; yet, if lands are decreed to be sold for payment of debts, a court of equity ought to assist a fair creditor, (though a papist protest) in obtaining a satisfaction for his debt, and when the land is sold and turned into money, why should he not be paid his debts out of that money, as well as another person?*

But quære, if his judgment shall have the preference of other judgments subsequent to protestants, out of the money raised by sale, since if the lands were not sold, they would be liable to the other judgments, but not to the judgment given to a papist, who can't sue out an elegit.

Another point was started, that one of the judgment creditors had sued out a Ca. Sa. and taken the defendant Fletcher's body in execution.

Quære, if this creditor shall be let in, in a court of equity to have a satisfaction out of the money raised by sale, unless he will discharge the execution at law, and deliver the defendant out of prison; for by the Ca. Sa. this creditor has concluded himself from taking out any other execution as long as the defendant lives, but indeed, if the defendant dies in prison, after his death the creditor may sue out an Elegit or Fi. Fac. but as long as the body of the defendant remains in execution, no other execution can be sued out against him.

Ordered, that all the lands be sold, and an account stated of the debts, and their priority, and if there be sufficient to pay all the creditors, then the money to be so applied, but if there be a deficiency, then, upon the master's report, the court to determine

as to the preference of the creditors; per Parker C. MS. Rep. Hill. 6 Geo. in Canc. *Lowther v. Fletcher, & al'*.

5. *Bill to have a satisfaction of a judgment, against a purchaser of the equity of redemption of the land, or to redeem incumbrances, &c.* The defendants insist on Stat. 4 & 5 W. & M. cap. 20. that no judgment shall affect a purchaser or mortgagee unless docketted, *this judgment was not docketted till 1721, and the purchase was made in 1718.*

Counsel for plaintiff insist, that the defendant, *the purchaser, had notice of this judgment, and an allowance for it in the purchase, and that raises an equity for the plaintiff against him.*

Macclesfield C. It is plain the defendant had notice of the judgment, and did not pay the value of the estate, and that is a strong presumption of an agreement to pay off the judgment, and since the plaintiff cannot proceed at law against the defendant upon the judgment, for want of docketting in due time, he ought to be relieved in a court of equity.

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Decree, that the defendant pay to the plaintiff the money bona fide due upon judgment. MS. Rep. Mich. 9 Geo. Canc. *Thomas v. Pledwell.*

6. *A judgment was signed in June 1725. A mortgage was made to the plaintiff in 1728. In January 1730, the judgment was docketted, as appears by entry in the margin of the docket. Master of the rolls held, that the docket was not good, being made after the time limited by 4 & 5 W. & M. cap. 20, and that the officer had no authority for it, and said, he would complain to the judges of the attorney's keeping back the rolls. That the mortgage had got the preference of the judgment by defect of the docket. And as to the notice that the statute being express, that judgments not docketted should loose their preference as to purchasers and mortgagees, notice or not notice was not material, though urged, that the docket was purely to give notice, and to make the finding of judgments more easy. Decree for the plaintiff; but the cause turned upon the foot of an agreement between plaintiff and defendant, touching the defendant's delivering up the bond and judgment. MS. Rep. Mich. 1733. Forshall v. Coles.*

7. Where by the statute of frauds it is said, that judgments shall not bind lands, but from the signing, this relates only to purchases, and therefore, as between creditors, a judgment entred in the vacation relates to the first day of the preceding term; per Ld. C. 3 Wms's Rep. 399. Mich. 1735, in case of *Robinson & al' v. Tonge & al'.*

[For more of creditor and debtor, see Charge, Payment, and other proper titles.]

Creditor and Bankrupt.

(A) Bankrupt. Who may be.

1. 21. *Jac.* 1. *cap.* 19. **A**LL acts against bankrupts, shall extend to strangers born, as well aliens as denizens, as effectually as to natural-born subjects, both to make them subject to the laws as bankrupts, as also to make them capable of the benefit as creditors.

2. A shoemaker may be a bankrupt, for he doth not live by his manual occupation only, as a labourer doth, but by buying leather and selling it again in shoes. *Cro. Car.* 31. *Pasch.* 2 *Car.* 1. C. B. in *Case of Crumpe v. Barne*.

3. A drover is within the statutes, for an action on the case will lie for calling him bankrupt. *Jo.* 304. *pl.* 12. *Mich.* 8 *Car.* 1. B. R. *Collis v. Malin*.

[55] 4. One who had a stock in the *East India Company*, and who sat in their committees as a merchant in the management of their trade, and did receive the profits of his stock upon the return of the ships, though he had a great estate in lands, and did not get the most part of his living by buying and selling, yet he may be a bankrupt, for it is not the quality of his person, or the greatness of his estate, which protects him from those laws, but his buying, selling, and trading, makes him liable to be a bankrupt; and this was the case of Sir John Wolstenholme. *Nelf. Ab.* 336. *pl.* 8. *cites Pasch.* 1653.

24 relating to bankrupts.—Dealers in stocks are not thereby made liable to bankruptcy; per *Ld. C. King.* 2 *Wms's Rep.* 308. *Mich.* 1725, in case of *Colt v. Nettervil*, *cites Wolstenholme's case*.

Having stocks, or the dealing in them, will not make a man liable to bankruptcy, nor do they seem to be wares, goods, or merchandizes within the intent of the clause of the statute of 13 & 14 *Car.* 2. *cap.* 24. Per *Ld. Chancellor.* 2 *Wms's Rep.* 308. *pl.* 86. *Mich.* 1725.

5. 13 & 14. *Car.* 2. *cap.* 24. S. 3. No persons who shall adventure any money in the * *East India Company*, or *Guinea Company*, or any joint stocks of money by them raised for carrying on the trade by the said *East India Company*, or *Guinea Company*, to be managed, or who shall adventure any money in any stocks for managing the fishing trade, or the trade called the *Royal Fishing Trade*, and shall receive their dividend of fish or merchandizes in specie, and shall sell or exchange the same, shall by reason of such adventure, selling or exchanging, be adjudged a merchant within any statute for bankrupts.

S. 4. Provided that every person, who shall trade in any other way than in the said *Royal Fishing Trade*, or the trade managed by the

* And see *Stat.* 9 & 10 *W.* 3. *cap.* 44. S. 74.

the said East India Company, or the Guinea Company, shall, by reason of his trading and merchandizing, be liable to commissions against bankrupts, as fully as if this act had never been made.

6. In trover, &c. upon not guilty pleaded, the question of fact was, whether the defendant was a bankrupt, he being the owner of the goods; the plaintiff proved, that he *had silk and other goods*, to a great value in his warehouses, and that *upon the credit of them he took up money*; but could not prove that the goods were brought in after the defendant had contracted debts, or that he had exported any at any time after, or for a long time before; the court held, that the selling these goods, if they were the effects of his former trading, which he could not put off immediately, when he ceased to trade, could not make him a trader; for the statute extends to those only that live by buying and selling. Vent. 29. Pasch. 21 Car. 2. B. R. Sir Robert Cotton v. Daintry.

Sid. 411: pl. 7 Cotton v. Daintry and Bateman, S. C. says, that it was 15 years after he ceased his trade that this action was brought, and the court held accordingly, and cited

the cases of Harrison and Harvey to be so adjudged, unless the debts were contracted during the trade; but if such person trades again, and then becomes indebted, he may be a bankrupt for this debt, but not for the debts contracted between.—But afterwards it was held otherwise, as where one had formerly been a Turkey merchant, and traded in 1656 (but had not of late years imported or exported any thing) but had goods which were the effects of his former trading to a very great value, which he shewed to several persons, and borrowed money upon the credit of them; the court held, that this brought him within the statute, for such debts as he contracted after 1656. Vent. 166. Mich. 23 Car. 2. B. R. Sir Anthony Bateman's case, S. C.

7. The defendant, with others, covenanted with the king to provide victuals for the seamen in the Dutch war, at 8d. per man; and afterwards these victuallers agreed with the pursers of the ships to provide for those men at other rates; afterwards the victuallers being discharged from that employment, and having a great sum due to them from the king, refused to pay the pursers, supposing themselves not to be debtors, until such time as their accompts with the king were allowed, and so it was said was the custom of the navy board, whereupon a commission of bankrupt issued out against them, and debt was * brought by the plaintiff, who entitled himself by assignment under the commission. The court were clear of opinion, that the employment in buying stores and provisions for the navy, did not make them traders; nor was it a buying and selling intended by the statute. And Hale said, every purveyor might as well be made a trader, or every school-master who keeps boarders. 1 Vent. 270. Pasch. 27. Car. 2. B. R. Sir Thomas Littleton's Case.

3 Keb. 451. pl. 16. Gibson v. Thomson, S. C. and verdict for the defendant, by the particular direction of all the court on this point, and they would not suffer it to be found specially, tho' pressed by the plaintiff. * [56]

8. Upon an issue directed out of Chancery, whether bankrupt or not, within the statutes of England at the time of making a conveyance of land by him to the plaintiff. The jury found the defendant was born in England, and after dwelt in Ireland, and there sought his living by buying and selling; that he came frequently into England, and bought goods here, and sold them in Ireland, and was indebted to diverse persons in England, to the value of 100l. and more, yet unpaid. That once he sold in England a parcel of neats tongues, and after sold in Ireland a parcel of tallow to be delivered in England, and which was delivered accordingly. And afterwards he left his house in Ireland, and his

Raym. 175. S. C. adjudged accordingly. — But whether committing acts of bankruptcy, beyond sea or whether trading only beyond sea, be within the reach of the statute,

is a point not yet settled. 2 Vern. 16a. and distinguished this from Anderson's case, which is the S. C. as above. Trin. 1690.

trade also there, and absented and absconded from his creditors, and came and sojourned in England, and ordered himself to be denied to persons inquiring for him, and all this before the conveyance made; but that the said conveyance was made bona fide, and for a valuable consideration. And if &c. It was insisted among other things, that the jury make no conclusion upon the evidence that he is bankrupt, and that the court cannot. But per tot. Cur' judgment was given for the plaintiff, for it was said, that though the jury found the matter specially, the court may conclude upon the evidence, that he is a bankrupt, and this by the statutes here; for if this case shall not be taken to be within the statutes, all the intercourse between the kingdoms will be much interrupted, if not utterly destroyed. 2 Jo. 141, 142. Pasch. 33 Car. 2. B. R. Dodsworth v. Anderson.

3 Mod. 330. mentions nothing of a taylor.

—Law of bankrupts 9. says, that a taylor that makes garments only as a servant to his customers shall not be a bankrupt; [and this seems to be true, but no book there cited mentions a taylor.]—Dav. of Bankrupts 25. accordingly, but cites no book.

9. A taylor cannot be a bankrupt, because he gets not his living by buying and selling, but by working up the materials of his customers in cloaths, and so differs from a shoemaker. R. S. L. 185. cites 3 Mod. 330.

Dav. of Bankrupts, 23, 24. S. P. and cites Mary Dennis's case, 16. Mar. 1741.

10. A *feme sole merchant* in London, is held to be within the statutes of bankrupt. R. S. L. 186. cites Stone's Readings 48.

11. No *handicraft* man is within the statute of bankrupts, but a *vintner* is. R. S. L. 186. cites Stone's Read. 121. Quere.

Carth. 151. S. C. & S. P.

12. There is no material difference between an inn-keeper and the *master of a boarding school*, who buys and dresses provisions for young scholars, and obtains credit by his way of living, but it was never yet thought that he was within any of those statutes. 3 Mod. 330. per Cur'. Mich. 2 W. and M. in B. R. in Case of Newton v. Trigg.

*[57]

3 Lev. 309. S. C. adjudged by three justices, absente Dolben, (who held contra at first, but afterwards assented to the judgment, (as himself

13. An *inn-keeper* was part owner of a ship, and having 50l. stock therein, absconded. It was held by Holt Ch. J. and Eyre J. that the share of the ship was only stock to trade in potentia, that there *must be an actual trading* to make him a bankrupt; that an inn-keeper is not a trader, for he buys provisions, not for trading, but to accommodate his guests, and not to sell again at large. And Holt C. H. J. *held, that where a man buys and sells under a particular restraint, he is not seller within the statute. 1 Salk. 109. Trin. 3 W. and M. in B. R. Newton v. Trigg.

told the reporter) that an inn-keeper cannot be a bankrupt, and as to his having part in a ship freighted, and a stock in it, no regard was had thereto, the same being found imperfectly—Show. 96. S. C. Holt Ch. J. and Eyre J. thought him not liable, but Dolben contra, sed adjournatur.—Ibid. 268. S. C. and the three judges delivered their opinions seriatim that he was not liable, and Holt Ch. J. declared Dolben to be of the same opinion.—3 Mod. 327. S. C. adjudged accordingly.—Carth. 149. S. C. adjudged accordingly per tot. Cur. and it was resolved by all, that *building, and having a share in a ship*, is no more than if a man has a share in a barge or coach which are let to hire, &c. and that his having some stock in a ship does not make him a merchant, because it is frequent for persons to *adventure some particular things in such*

both a ship for such a voyage, but that will not make them traders within the statutes, for by those statutes professed merchants are only meant, who are in constant trading.—Skinn. 276, and 291. Luton v. Bigg, S. C. and same points adjudged accordingly.

14. *Steward of an inn of court* cannot be a bankrupt; per Holt Ch. J. Skin. 292. Trin. 3 W. & M. obiter.

15. In trover the jury find a special verdict, that an *inn-keeper* bought goods for the use of his guests and sold them to his guests, and the question was, whether the inn-keeper by this was a bankrupt? And adjudged by the whole court that he was not; because the trade was not at large, but confined hospitibus, and is properly the accommodation of his guests, and it was agreed in that case, that *farmers* are not within the statutes of bankrupts; it was also found in that case that the *inn-keeper* had a share in a stage coach, but that was not regarded. Cited per Holt Ch. J. Raym. Rep. 287. As the case of Newton v. Trigge adjudged Trin. 3 W. & M. in B. R.

An inn-keeper cannot be a bankrupt; per Holt Ch. J. and not denied by the court. 18 Mod. 159. Hill. 9 W. 3. in case of Meggot v. Mills.
—An inn-keeper as

such is not within the statutes of bankrupts, because he does not live by buying and selling, but by uttering his goods without any contract, and if he utters them at an unreasonable rate he is indictable for extortion, which a seller is not. Resolved by all the justices. Mar. 34. pl. 67. Trin. 15 Car. Crisp v. Pratt. — Jo. 437. pl. 3. S. C. adjudged. — Cro. C. 548. S. C. resolved accordingly — But where an inn-keeper is a *chapman* also, and buys and sells, he may on that account be a bankrupt, though not barely as an inn-keeper, and this has been frequently seen.

16. A *gunfounder* is not within the statutes of bankrupts, because this was for the service of the king and delivered to his use. Cited per Cur. Skinn. 392. Trin. 3 W. & M. in B. R. to have been lately adjudged.

S. C. cited by Holt Ch. J. Show. 270. as held not within the statutes,

because it was a particular undertaking.

17. A *gentleman* of the Temple went to Lisbon and turned *factor*, and traded to England, and broke. And it was argued, that the statute of bankrupts did not extend to persons out of the realm. But the court held him to be a bankrupt by reason of his trading hither and back again, which gained him a credit here; per Cur. on a trial at bar. 1 Salk. 110. pl. 5. Pasch. 5 W. & M. Sedgwick v. Bird.

18. If a man, whilst a trader, owes a debt of 100l. to A. and leaving off his trade, borrows another 100l. of the same person, then pays him one of the 100l. not mentioning whether it be in satisfaction of the former debt, or the latter, yet it shall be applied to the former, so that the creditors shall never charge him with a commission of bankruptcy for that which remains; per Holt Ch. J. Comb. 463. Mich. 9 W. 3. B. R. Anon.

19. If A. leaves off trade, he shall be a bankrupt for debts contracted before, but not for debts contracted after. Resolved by Holt Ch. J. Cumb. 463. Mich. 9 W. 3. B. R. Anon.

S. P. Levi 17. Hill. 12 & 13 Car. 2. B. R. Bateman v.

Harvey, the court inclined accordingly as to both points, sed adjournatur. — Vent. 5 Mich. 20 & 21 Car. 2. B. R. Anon. & F. accordingly, and says it was so ruled in Sir Jo. Harvey's case.

12 Mod. 20. A *viſtualler* may be a bankrupt, per Holt. Ch. J. Ld.
 159 S. C. Raym. Rep. 287. Hill 9 W. 3. B. R. in case of Meggot v.
 & S. P. per Mills.
 Holt Ch. J.

Ld. Raym. 21. The defendant was indicted, for that he being a bankrupt
 Rep. 443. and brought before lords commissioners, he refused to give them
 S. C. in toti- an account of his effects, and his defence at trial, upon not guilty
 dem verbis. pleaded, was, that he was an *infant at the time of the debts con-*
tracted, and therefore could not be a bankrupt; and of that
 opinion was Holt; for though the debts of an infant are only
 voidable at his election; yet no one can be a bankrupt for a debt
 he is not obliged to pay; wherefore the defendant was acquitted.
 12 Mod. 243. at Guild-hall, Mich. 10. W. 3. the King v. Cole.

22. It was ruled by Holt Ch. J. at Lent assizes at Thetford,
 16 Mar. 12 W. 3. upon evidence at a trial at Nisi Prius, that a
ship carpenter is within the statute of bankrupts. But a case was
 made of it for his farther consideration. Lord Raym. Rep. 741.
 Kirne v. Smith & al'.

23. Upon an issue directed in Chancery, to be tried before the
 Lord Ch. J. Holt for his opinion, the case upon the trial before
 him at Guild-hall the sitting after this term, appeared to be thus.
 A *scrivener*, who was not liable to be a bankrupt before the
 statute of 21 Jac. 1. cap. 19. committed an act, which was made
 an act of bankruptcy by the statute of 1 Jac. 1. cap. 15. viz. *abscond-*
ing, &c. and he had also a share in the stationer's company. And
 the question was, whether he was not a bankrupt by that? And
 Holt Ch. J. held that *since the 21 Jac. 1. cap. 19. had made a*
scrivener liable to be a bankrupt, it had subjected him to all the old
acts, which by the former statutes made a man a bankrupt, as well
as to the acts mentioned in the statute 21 Jac. 1. cap. 19. But as
 to the share in the stationer's company, he seemed to incline that
 that could not make him a bankrupt. But the Ld. Keeper held
 the scrivener to be a bankrupt by both the points. Upon the im-
 portunity of the council it was reserved as a case, as to both
 points, for the further consideration of the Ld. Ch. J. 2 Ld. Raym.
 Rep. 851, 852. Hill 1 Annæ. Bird v. Major.

Dev. of Bankrupts, 16. cites the case of Burchall a scrivener, against whom a commission of bankruptcy was moved for by Tribe, to which it was objected, that the statute of 10 Ann. cap. 15. enacts, that after the 12 April, 1712, the said act of 21 Jac. and all and every other act and acts, so far as they related to the said description of a bankrupt, should be repealed, and that no persons within the said descriptions should thenceforth, by reason thereof, be taken to be within the statutes of bankrupts whatsoever; and that Burchall set forth, that he never followed any other trade or profession than that of a scrivener, and therefore petitioned that no commission might be awarded against him; but a commission was awarded, and he was found a bankrupt in 1742.—And cites the case of Hudson a scrivener in Covent-Garden, against whom a commission issued, 1st Oct. 1742, and he was found a bankrupt, *Ibid.* 18.

24. The jury found that R. B. *rented a farm, for which he*
paid 300l. per ann. and that he planted potatoes on part of the lands
which he farmed, and that he bought great quantities of potatoes to
plant there, and that for several years he dealt with several persons
in potatoes, at several times and places, and had employed ware-
houses, where he put in potatoes, and had served several markets
therewith, and had sold great quantities thereof for profit, and for
his living, &c. The court being divided, no judgment was given, but

but two of the judges seemed to be of opinion, that if a man bought great quantities of wool or hops, though he hath a farm, and sheep of his own, and several hop gardens, he shall be accounted a trader in those commodities; and so shall an inn-keeper, if he turn conchandler. 'Tis true, the jury have not found that B. got the chiefest part of his livelihood by buying and selling potatoes; but it is not the quantity which is material, if it is in proportion to other goods which he buys and sells; for if a man hath an orchard, and buys several quantities of fruit of other people, though not so many as he hath in his own orchard; yet this shall make him a trader and consequently subject him to the statute of bankruptcy. The two other judges were of a contrary opinion, viz. that nere was not enough found by this verdict to make B. a bankrupt; for a farmer is no trader within any of the acts before-mentioned, quatenus a farmer; and though he uses another trade, yet if that is not the principal means of his livelihood, he is not a trader within those statutes; it is true if buying and selling in any trade is the chiefest means of his livelihood, then he is a trader within the acts of bankruptcy; but that is matter to be given in evidence, and found by the jury, which was not done in this case. 8 Mod. 46. 48. Trin. 7 Geo. Mayhoe v. Archer.

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A person, being under the age of twenty-one, bought goods, and after the age of twenty-one committed an act of bankruptcy in respect of those goods on which the commission issued. Ld. Chan. Macclesfield doubted whether he might not be a bankrupt; but the Chan. [Ld King] was clear of opinion he could not, and said, if commissioners find a man a bankrupt who is not so, action will lie against them. Select Cases in Chan. in Ld. King's time 46, 47. Trin. 11 Geo. 1. Whitlock's case.

25. 5 Geo. 2. cap. 30. S. 39. bankers, brokers, and factors, are declared liable to the statutes of bankrupts.

26. S. 40. Provided always, and it is hereby further declared and enacted by the authority aforesaid, that no farmer, grazier, or drover of cattle, or any person or persons, who is, or are, or shall be receiver general of the taxes granted by act of parliament, shall be entitled as such to any of the benefits given by this act, or be deemed a bankrupt within the same, or within any of the statutes now in force concerning bankrupts, any law, custom, or usage, to the contrary notwithstanding.

27. A pawn-proker is not within the statutes of bankrupts, barely as such, but if he trades other ways, a statute may be taken out against him by the addition of dealer and chapman. Dav. of Bankrupts 24, 25, cites Highmore's case in 1737, and Read's case in 1742. And that several commissions have been taken out accordingly.

28. Members of the Bank of England are not liable, on account of their stocks, to become bankrupts. See the several acts of parliament relating to the Bank of England.

29. So of the South Sea Company. See the several statutes as to that company.

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30. *So of the Royal Exchange and London insurances.* See 6 Geo. 1. cap. 18. S. 10.

31. *So of persons circulating exchequer bills.* See the several statutes relating thereto.

(B) Bankrupt. By what Act.

A merchant in good circumstances departs the realm to merchandize, and afterwards runs in debts, and

to avoid arrests, defers his return, this is tantamount to his departing the realm to defraud his creditors, and he shall be adjudged a bankrupt. R. S. L. 186. cites Stone's Read. 123.

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One against whom a *capias de excommunicato capiendis* is awarded, departs the realm to avoid being taken, this is not an act of bankruptcy, any more than the departing the realm or keeping his house for fear of an attachment out of Chancery. R. S. L. 186. cites *ibid.*

A merchant indebted keeps on shipboard, this is keeping his house. R. S. L. 186. cites *ibid.*

An apothecary being church warden, and in debt, kept in church, this was deemed a keeping his house. So where one has no house of his own, but keeps in another man's house, or in a chamber he hires, this will be adjudged keeping his house. R. S. L. 186. cites *ibid.* 124.

If the lieutenant of the Tower of London be a merchant indebted, and keeps in the Tower it is an act of bankruptcy. R. S. L. 186. cites *ibid.*

2. A process issued against J. S. to arrest him, he keeps his house to save himself from arrest, and afterwards goes out to the market, and to other places; and when he hears again of a new process out against him, he keeps his house again, and afterwards goes at large; the question was, if he were within the statute of bankrupts? and all the court held he was not, because he used to go at large; and it might be, that his policy would not prevent the serving of the process; for he might be met withal unwittingly. Cro. E. 13. pl. 6. Hill. 25 Eliz. C. B. Anon.

3. 1 Jac. cap. 15. S. 2. Every person using merchandize, &c. who shall willingly or fraudulently procure himself to be arrested, or his goods, money, or chattles, to be attached, or sequestred, or depart from his dwelling house, or make any fraudulent grant or conveyance of his lands or chattles, whereby his creditors may be defeated or delayed for the recovery of their debts; or being arrested, shall, after his arrest, lie in prison six months upon that arrest, or any other arrest or detention for debt, shall be adjudged a bankrupt.

4. A merchant had made a fraudulent deed to the defendant of the goods contained in the count, but afterwards he went abroad to church, to the Exchange, and did trade and commerce; and yet afterwards it is contained in the indenture of sale by the commissioners to the plaintiff that he had made this fraudulent deed, and that afterwards he had traded and served the Exchange until a day after, at which day he wholly absented himself. And upon this special verdict the defendant had judgment; for every deed to defraud

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defraud other creditors (but those to whom such deed is made) is not sufficient to make one to be a bankrupt; but 'if he make any deed after he begins to be a bankrupt, it shall not bind; but upon the stat. of 1 Jac. which makes him a bankrupt which makes fraudulent deeds, it ought not to be as this case was, viz. so long before he became a bankrupt. Hutt. 42. Pasch. 15 Jac. Cartwright v. Underhill.

5. If one *exercises a trade*, and then becomes indebted, and afterwards *quits his trade, and lives in the country* without following any trade, but lives on his land only, and conceals himself from his creditors, yet he is a bankrupt; for he lived by his trade when the debt grew. Agreed. Palm. 325. Mich. 20. Jac. B. R. Heylor v. Hall.

6. If one for a time *deals in a trade*, and afterwards *quits it*, but *leaves his stock in the hands of another, and goes shares with the other*, both in profit and loss, and after such quitting, becomes indebted and conceals himself from his creditors, he is a bankrupt within the statute. Agreed. Palm. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

7. If one *confines himself within his house for a long time*, this does not make him a bankrupt immediately; but if he conceals himself *for a day or an hour, to delay or defraud his creditors*, this makes him a bankrupt within the statute. Palm. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

8. If one is *surety* for another, and *conceals himself*, he is a bankrupt within the statute. Agreed. *ibid*.

9. 21 Jac. 1. cap. 19. S. 2. *Every person using the trade of merchandize, by way of bargaining, exchange, bartering, chevifance, or otherwise in gross, or by retail, or seeking his living by buying and selling, or that shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody, who shall obtain any protection (other than such persons as shall be lawfully protected by privilege of parliament) or shall prefer unto his majesty, or unto any of the king's courts, any petition or bill against his creditors, or any of them, thereby desiring or endeavouring to compel them, to accept less than their juit and principal debts, or to procure time, or longer days of payment, than was given at the time of their original contracts; or being arrested for debt, shall after his arrest lie in prison two months upon that, or any other arrest or detention for debt; or being arrested for 100l. or more, of just debt, shall after such arrest escape out of prison, shall be adjudged a bankrupt; and in the case of arrest, or lying in prison for debts from the time of his first arrest.* [61]

10. A tradesman being outlawed, becomes a bankrupt; but if the outlawry be reversed for want of proclamation, all that is done in the mean time by the commissioners is void; contra, if it was reversed on a writ of error. R. S. L. 186. cites Stone's Read. 124.

11. If a trader, hearing that a writ of fieri facias was issued against him, to the intent to *preserve his goods from being levied in execution, clandestinely conveys them out of his house, and conceals them privately*; that does not amount to an act of bankruptcy.

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Ruled by Holt Ch. J. Ld. Raym. Rep. 725. Hill. 10 W. 3.
Cole v. Davis.

*Stopping
payment by
a goldsmith
is an act of
bankruptcy.*
MS. Tab.
Feb. 21.
1726. Pakenham v. Hopkins.

12. If a banker or goldsmith, who has many peoples money, will refuse payment, yet keeps his shop open, and as often as he is arrested gives bail, he may by that means give preference of payment to his friends, and when he has done, he runs away, yet such payment shall stand good against a commission of bankruptcy. And this was practised in the case of *Sheppard the banker*, who was arrested almost every hour in the day for several days before he went off, and yet gave a bail as often, and paid his friends, and then went and rendered himself in discharge of his bail; per Holt Ch. J. 7. Mod. 139. Hill. 1 Ann. B. R. Hopkins v. Gery.

13. A banker, being called upon for money in his hands, does not, or cannot, pay it; Lord Chancellor King held, that this does not amount to an act of bankruptcy. Select Cases in Chancery in Ld. King's time, 42, 43. Trin. 11 Geo. 1. in case of *Pakenham v. Bland and Hopkins*.

14. L. having two promissory notes signed by A payable to L. or order four months after date. L. when about three months was to run, endorsed them to M for goods then delivered, and A absconding about one month after, L. on M's going to him, procures himself to be detained, and then M. sues out a commission of bankruptcy against L. who petitioned to supercede the commission. 1st, objection was, that L. had committed no act of bankruptcy. 2dly, that M. was not a proper creditor.

Ld. Chancellor. By late statute a creditor by note payable at a future day, may sue out a commission, as well as come in as a creditor; but the debtor's denying himself to such a creditor, is not an act of bankruptcy; it must be a *keeping house*, &c. in order to defeat or delay creditors of their debts, which could not be in the present case, because M. had then no debt due to demand, and so a commission superceded. It was objected, that L. was debtor to M. immediately upon the goods delivered; sed non allocatur; for by Ld. Chancellor, it was part of the contract that M. would stay for the money, till the notes became due. Mfl. Rep. Mich. Vacation. 1733. Ex parte Levi.

15. B. was arrested for 28l. and though he had money sufficient to pay the debt, yet chused rather to go to prison, in order, as he declared, to force his creditors to come to a composition. And per Ld. Chancellor, this is an act of bankruptcy within 1 Jac. 1. though, without such intent, yielding himself to prison was no act of bankruptcy, unless he lay there two months. Otherwise, where the party procures himself to be arrested upon a sham debt, and that, by the statute of Elizabeth, is immediately an act of bankruptcy. Mfl. Rep. Trin. Vac. 1734. Ex parte Barton.

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(C) Proving

(C) Proving him a Bankrupt. How?

1. IF the commissioners, without pursuing the statutes of bankrupts, affirm a person to be a bankrupt, he may traverse that he was not bankrupt, cited by Coke Ch. J. 8. Rep. 121. 2. as adjudged Mich. 6 Jac. B. R. Cut v. Delabarre.

2. In the case of bankrupts, although the commissioners have sole authority to adjudge a man bankrupt, yet in an action the jury must find whether he was a bankrupt or no, and not barely by the adjudication of the commissioners. Raym. 337. Hill. 31 & 32 Car. 2. Bambridge v. Bates & al'.

3. It was ruled by Treby Ch. J. of C. B. at Nisi Prius at Guildhall, the sitting after Michaelmas term, 10 Will. 3. upon evidence in trover brought by the plaintiff against the defendant, after argument of the council on both sides, 1. That it is not necessary to prove, that the person, upon whose petition the commission of bankruptcy was granted, was a creditor of the bankrupt; because upon view of the statutes they do not require that. 2. That it is not necessary to prove, that the bankrupt was indebted in 100l. though the practice has been to do so; because though the chancellor frequently, before he grants a commission of bankruptcy, requires such proof, yet it is only matter of discretion in him. Ld. Raym. Rep. 724. Smith v. Sir Richard Blackam.

4. The wife of a bankrupt cannot be examined against her husband touching his bankruptcy. By the common law, she cannot be a witness for or against her husband; and though the former statute of 21 Jac. authorizes the commissioners to examine the wife touching any concealment of his goods, &c. yet neither that, or the late statute of 5 Geo. 1. 24. extends to examine the wife touching the bankruptcy, or whether he had committed any act of bankruptcy, and how, and when he became a bankrupt; per Ld. C. Parker. Hill. 1719. Wms's Rep. 610. 611. Ex parte James.

And if they commit her and the warrant of commitment mentions it to be as well for refusing to discover the goods, &c. of a bankrupt, as the time and manner

of his bankruptcy; yet, Ld. C. held the commitment illegal, and ordered, that she be discharged. Wms's Rep. 611. S. C.

5. Till the statute of 5 Geo. 1. cap. 24. the commissioners could not examine the bankrupt himself touching his bankruptcy; per Ld. C. Parker, Wms's Rep. 611. Hill. 1719. Ex parte James.

(D) From what Time. To what Time the [63] Bankruptcy shall relate.

1. A GRAZIER copy-holder in fee, 10 May 1643, became a bankrupt, and in 1649 became a bankrupt again, and in 1652 he sells his copyhold. On a commission in 1651 (which was

Goodw. of Bank. 33. cites Hill. 1657. Jekyll v. ten

Horn, that a commission of bankrupt was sued out against a person, and it was confessed he was a bankrupt in 1641, but it was said, he became a bankrupt again in the year 1649. And Hale made this difference, that if one becomes a bankrupt by a transient act, as in case of suit, &c. he may again become bankrupt; but if it be a continued act, as imprisonment, withdrawing himself, &c. he may not become a bankrupt again; so with this distinction you may understand how it is said, once a bankrupt and always a bankrupt.

2. A. did an act of bankruptcy in 1651, and in 1657 did another act, and in 1658 made a lease for years of lands, and in 1663 a commission issued, whereupon he was found a bankrupt, and the lands sold. It was resolved that the commission was well sued out within five years after the last act, though not within the five years before the commission, [of the first act of bankruptcy] and also before the lease, [and] the vendee of the commissioners shall avoid the lease. Lev. 14. the reporter says, that he heard and observed this case. Pasch. 16. Car. 2.

commission shall relate to the first act, 1651, which was the most notorious, being by imprisonment, though had the first act been by concealment or outlawry, he agreed, the party-creditor need not take notice of it by the 21 Jac. which he said, should not be taken favourably against the purchaser, but only against the bankrupt himself, and cited the case of *Bradford v. Bludworth*; but Curia contra; for the words of the act are not, "after he shall first be a bankrupt." For then the earlier being a bankrupt, would, after five years, be a perpetual superfluities to all traders; but if one hath sold, and then five years pass without any act of bankruptcy, the purchaser is safe, and then no act can hurt him; but where the bankrupt continues in possession, any after act is sufficient to bind the term; and judgment clearly for the plaintiff.

3. One Staly was arrested by an executor of his creditor, before probate of the will, and put in bail, and within two or three days after he paid 100*l.* to the defendant to whom he stood indebted in such sum, and then yielded himself to prison in discharge of his bail. The question was, whether Staly should be said to be a bankrupt from the time of his first arrest (and so the defendant be liable to refund the money paid to him) or from the time he yielded himself to prison. Judgment was given in C. B. for the defendant; and upon error brought in B. R. the judgment was affirmed una voce, for that the relation to make a man a bankrupt ought to be upon an actual lying in prison, and not upon putting in bail only. 1 Vent. 370. Pasch. 36 Car. 2. B. R. *Duncomb v. Walter*.
 3 Lev. 57. S. C. —
 Raym. 479. S. C. in
 B. R. adjournatur. —
 Skinn 22. Mich. 33
 Car. 2. C. B. the S. C. and adjudged for the defendant. —
 Ibid. 87. S. C. and judgment affirmed in B. R. —
 Show. 253, pl. 261. S. C. and judgment affirmed.

4. If one is *arrested and puts in bail*, and after does not pay the money within six months, he shall be adjudged a bankrupt after the six months only, and it shall not relate to the time of the arrest. And so is the stat. of 21 Jac. 19. to be understood, for it may be that he had cause to contest the debt, and the suit might depend above six months; and also it would be mischievous to all persons who deal with them, to make them refund their money, when the bankrupt appeared to be a man creditable and solvent, and judgment accordingly; per tot. Cur. Skin. 270. Trin. 3 Jac. 2. Hinton's case.

Freem. Rep. 270, 271, pl. 298. Pasch. 1680. S. C. and if the becoming a bankrupt by not paying his debt within six months, should relate to the

time of the arrest, so as to avoid all contracts made by him in the mean time, the court said, it would be very mischievous if the law should be so, and it seemed to be within the words of the statute, but they would not deliver any opinion, — a Show. 518. pl. 476. Pasch. 3 Jac. 2 B. R. Hill v. Shiff. S. P. and seems to be S. C. argued by the reporter for the plaintiff, 518, to near the end of page 535. and says, that Ld. Ch. J. Wright, and the rest, delivered their opinions for the defendant, without having that due consideration of the case as it deserved, as he thought; and adds, ideo mihi reitit dubitandum.

5. Indebitus; in a special verdict, the case was, that H. being a tradesman owed 100l. to B. and 50l. to C. B. arrested him for this 100l. and he put in bail, and about a month afterwards H. paid off C. and then rendered himself in discharge of the bail in B's action. Note, the statute of 21 Jac. cap. 19. says, he shall be a bankrupt from the first arrest; but per Cur. that must be taken from the first arrest upon which he lies in prison, and not where he puts in sufficient bail, otherwise no one could safely pay or receive from a tradesman; adjudged in B. R. and affirmed in error in Cam. Scacc. 1 Salk. 109. Trin. 2 W. & M. Came v. Coleman.

6. In trover the case was, J. S. was arrested at the suit of H. and put in bail. Afterwards upon a scire facias at another's suit, his goods were sold to the plaintiff; after this J. S. renders himself in discharge of his bail and goes to prison. And Holt Ch. J. inclined (contrary to the case of Duncomb and Walter in 3 Ley. 57. wherein he was of counsel, but not satisfied with the judgment) that J. S. was a bankrupt from the time of the arrest, not from the render only; for if H. is arrested at the suit of A. and puts in bail, and, that pending, is after arrested at the suit of B. and goes to prison and lies two months, he is, by the act of parliament, bankrupt from the time of the first arrest by A. But it appearing in this case, that the commission was taken out before the two months were expired from the render, it was held to be ill taken out; J. S. not being then a bankrupt. And thereupon the plaintiff had a verdict. 1 Salk. 110. pl. 7. Trin. 2. Ann. Coram Holt Ch. J. at nisi prius at Guildhall. Smith v. Stracy.

Dev. of Bankrupts 381. in the case of Tribe v. Webber. Pasch. 17 Gen. 2. C. B. Willes Ch. J. cited the case of Smith v. Tracy, reported in Salk. and said, that it was only an obiter opinion at the Nisi Prius, and that there the commission

was taken out before the bankruptcy, so that there was no determination on that point. And the words in the act, viz. "or shall procure his enlargement by putting in common or bired bail" are by 20 Ann. cap. 15. repealed; so that the putting in bired bail is no act of bankruptcy; by which it is plain, that bare arrest, and putting in bail, are not considered as acts that hurt a man's credit; the act of parliament must mean, that where there is a lying in prison for two months, the bankruptcy shall not be from the end, but the beginning of the two months, viz. from the arrest; but in the principal case, where the debtor on the 23 June, 1740. was arrested upon a writ returnable in three weeks after Trinity, at the suit of the plaintiff Tribe, and at the return thereof put in special bail, and being indebted to the defendant Webber in 365l. 18s. on the 7th of January following paid him

him 347l. and on the 19th of August, 1741, paid him the further sum of 18l. 18s. the court were of opinion, that as to such payments as were made between the arrest, and the debtor's surrendering himself to prison, which was after the payment of the 347l. were good payments to the defendant Webber, but that the plaintiff shall take a verdict for the 18l. 18s. which was paid after the bankrupt's surrendering himself to prison.

[65] 7. Upon an issue directed out of Chancery, whether bankrupt or not at such a time, it was held per Holt C. J. that if H. *commits a plain act of bankruptcy*, as keeping house, &c. though he after goes abroad and is a great dealer, yet that will not *purge the first act* of bankruptcy, but he will still remain a bankrupt; but if the act was *not plain but doubtful*, then going abroad and dealing, &c. will be an evidence to explain the intent of the first act; for if it was not done to defraud creditors and keep out of the way, it will not be an act of bankruptcy within the statute. 1 Salk. 110. pl. 6. Trin. 3 Ann. coram Holt Ch. J. at Guildhall, Hopkins v. Ellis.

(E) Commissions. How and when to be granted, &c.

1. 13. Eliz. cap. 7. S. 2. **C**HANCELLOR is to appoint commissioners to seize his person, estate, and effects, and so distribute the proceed rateably among the creditors.

2. There ought to be a petition in writing to my Ld. Chancellor, or else he has no warrant to grant a commission, and then whatever the commissioners do will be void. Resolved. Freeman. Rep. 270. pl. 298. Pasch. 1680. C. B. Hinton's case.

3. If the examinations are lost by fire, &c. if there ought in such cases of fire to be a new commission, quære. 2 Show. 102. Pasch. 32. Car. 2. B. R. The King v. Ballat.

4. Commission of bankruptcy superseded by the consent of the petitioning creditors, North K. refused to revive it, or to grant a procedendo on the application of the other creditors that had not come in, but desired so to do. Vern. R. 208. Mich. 1683. Backwell's creditors case.

The superseded being granted within the time allowed for the non-petitioning creditors to contribute, Ld. Jeffries Ch. seemed to think it might be renewed. See 2 Chan. Cases 192. S. C.

5. The granting a commission is not a matter discretionary in the Ld. Chancellor, &c. but he is bound to do it; per North K. Vern. 153. Pasch. 1683. Backwell's case.

6. Commission of bankrupt cannot be granted but by petition of a creditor; per North K. 2 Ch. Cases. 191. Mich. 3 Jac. 2. Backwell's case.

But such petitioning creditor must not be one who is become a creditor since leaving off trade by the bankrupt, though if others sue out a commission, such may come in and join; per Holt Ch. J. 12 Mod. 159. Hill. 9 W. 3. Meggot v. Mills.

(F) Com-

(F) Commission. What Creditors may obtain it, and how, and when.

1. **I**F a man quits his trade, and after becomes indebted to J. S. In this case J. S. cannot sue a commission of bankruptcy for such debt contracted after, though if the old creditors sue a commission, this new creditor shall be admitted to have his share of the bankrupt's estate. Per Holt Ch. J. Ld. Raym. Rep. 287. Hill. 9 W. 3. in case of Meggot v. Mills.

2. if A. being a trader, becomes indebted to B. in 100l. and then he quits his trade, and afterwards becomes indebted to B. in 100l. more; A. afterwards pays to B. 100l. without saying upon what account. Holt Ch. J. said, that since so much in quantity is paid to B as was due to him from A. when A. was capable of being a bankrupt, it would be too rigorous to admit B. to sue a commission of bankruptcy for the old debt of 100l. But to this point he said, he would not give an absolute opinion; and none of the other judges contradicted it. Ld. Raym. Rep. 287. Hill. 9 W. 3. B. R. in the case of Meggot v. Mills. [66]

3. It was said by Holt, and not denied by the court, that if a man contracts debts while he is a dealer, and after leaves off his trade, and then commits an act of bankruptcy; there none of his creditors becoming so, since the leaving off of his trade, can sue out a commission of bankruptcy; but if those, who were his creditors before his leaving off his trade, sue out such a commission, the other creditors may come in and join. 12 Mod. 159. Hill. 9 W. 3. Meggot v. Mills, & al'. Ld. Raym. Rep. 287. S. C. & S. R.

4. B. gave A. two notes, the one for 50l. and the other for 53l. payable at different times. Afterwards B. before the day of payment of the second note, sued out a commission of bankruptcy; but Ld. C. Harcourt superfed the commission; but the court denied to assign the bond, the commission not appearing to be taken out maliciously or fraudulently, which are the words of the act. Wms's Rep. 260. Trin. 1714. Ex parte Mackerness.

5. Indorsee of notes of one, who afterwards becomes bankrupt, purchased in at an under value, as at 10s. in the pound, petitioned for a commission against the drawer. And Ld. C. Macclesfield held, that he was plainly a creditor, just as if the drawees had paid the bankrupt an under rate for them. Wms's Rep. 782. Hill. 1721. Ex parte Lee. And his lordship held, that though they had been given without any consideration, yet they are

now his debts, and the legal right vested in the indorsee; but otherwise in case of a bond assigned, for as much as such assignee, not being a legal creditor, could not have taken out such a commission; and had the indorsement been made after the bankruptcy, it might be a question, whether he would be intitled to a commission, as not being a creditor for 100l. or capable of taking out a commission at the time of the party's becoming bankrupt. Ibid.

6. 5 Geo. 2. cap. 30. S. 22. Enacts, that it shall be lawful for persons taking bills, notes, or other security for money payable at a future day, to petition for a commission, or join in petitioning.

7. S.

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7. S. 23. *No commission of bankruptcy shall be awarded, unless the single debt of the creditor, or of more persons being partners, petitioning for the same, amounts to 100l. or unless the debt of two creditors petitioning amounts to 150l. or unless the debt of more creditors petitioning amount to 200l. And the creditors petitioning shall, before the same be granted, make affidavit, or solemn affirmation, before one of the masters of chancery, of the truth of their debts, and give bond to the lord chancellor, in the penalty of 200l. to be conditioned for proving their debts, as well before the commissioners, as upon a trial at law, in case the due issuing forth of the same shall be contested, and also for proving the party a bankrupt, and to proceed on such commission as herein is mentioned.*

8. S. 25. *The creditors who shall petition for a commission of bankruptcy, shall be obliged at their own costs to prosecute the same, until assignees shall be chosen; and the commissioners shall, at the meeting appointed for the choice of assignees, ascertain such costs, and by writing shall order the assignees to reimburse such petitioning creditors out of the first effects of the bankrupt that shall be gotten; and every creditor shall be at liberty to prove his debt without paying contribution.*

[67] 9. The defendant *W.* being indebted to the plaintiff in 1730, afterwards committed an act of bankruptcy; upon which the plaintiff being the petitioning creditor took out a commission of bankruptcy against the defendant, in order to over-reach and make void as many of his conveyances and settlements, &c. as possible, the creditors on a bill filed endeavoured to prove him a bankrupt, as far backward as they could; and did actually prove, to the satisfaction of the court, that he committed an act of bankruptcy in the year 1726. Then it became a question, whether the commission of bankruptcy, and all that was done under it, was not wrong, in regard that the debt of the petitioning creditor on which it was grounded, was contracted subsequent in time to the first act of bankruptcy? After this matter had been argued, and time taken to consider of it; the Lord Chancellor dismissed the plaintiff's bill without prejudice. Note, this decree was reversed in the House of Lords, by the opinion of all the judges; February the 17th, 1737. Cases in Canc. in Lord Talbot's Time 243, 244. Mich. 1734. De Gols v. Ward.

10. Per Ld. Chancellor, where debt is due to wife as administratrix, the husband alone cannot take oath of this as a debt due to himself, in order for a commission of bankruptcy. Commission superseded, and restitution awarded. Mfl. Rep. Mich. 1734. Ex parte Staples.

(G) Commission superseded or abated.

1. *Yat. 1. cap. 15. S. 17.* **I** *F* after any commission of bankrupts sued forth, and dealt in by the commissioners, the offender happens to die, before the commissioners shall distribute

distribute the goods, or any of them; the commissioners shall in that case proceed in execution, upon the commission for the offenders goods, lands, as they might have done if the party were living.

2. If there be once a petition in writing, my Lord Chancellor may grant and repeal commissions toties quoties, and need not a new petition for a new commission, but may supersede the old commission, either for the miscarriage of the commissioners, or in case of death, or for any other reason, and may grant a new commission; and the granting a new commission is a superedeas to the old one; resolved. Freem. Rep. 270, 271. Pasch. 1680. C. B. Hinton's case.

3. If a commission of bankruptcy be sued out against one A. and the commissioners do, pursuant thereto, *declare him to be a bankrupt, and then he dies, and then the king dies*, and then a commission is renewed against him, whereupon the commissioners met and assigned his estate to one David Robinson and Charles Challis (being two of the creditors;) held per Justice Powell, Judge of Assize, at Somerset assizes in the summer, 5 Ann. that the commissioners might proceed after the death of the bankrupt. Arthur's case.

4. If a creditor by bond, before the day of payment sues out a commission of bankruptcy against the obligor, it is irregular, and is such irregularity, for which the commission ought to be superseded; for though it be debitum in presenti, yet as it cannot be so much as put in suit, or an action commenced upon it, much less can there be a commission of bankruptcy taken out upon it, by which all the real and personal estate of the bankrupt is (as it were) seised in execution. Wms's Rep. 610. Hill. 1719. by Ld. C. Parker. Ex parte James.

5. A commission was taken out and not sat on till three months after. Ld. Chancellor said it plainly shews it was done to protect the estate; the commission shall be superseded for example-sake, that such things should not be practiced. Select Cases in Canc. in Ld. King's time. 46. Trin. 11 Geo. Comb's case.

6. A. sued out a commission of bankruptcy against B. and kept it for 6 months, without doing any thing upon it, and afterwards executed it. Ld. C. King on a petition superseded it for this very reason; and it being urged, that the expence of another commission would be a fresh charge upon the bankrupt estate, his lordship replied, he would take care that the former commission should not be at the charge of the bankrupt estate. 2 Wms's Rep. 545. Trin. 1729. Ex parte Puleston.

7. A. being assignee under a commission of bankruptcy, dying indebted by bond, &c. the creditors of the bankrupt petitioned that the administrator of the assignee might account before the commissioners, suggesting that the administrator had confessed, that she believed her intestate, the assignee, kept the bankrupt's money in a separate bag, with a note in it, shewing it to be such. But the administrator denying this upon oath, and that he did not believe the fact to be so, and likewise swearing that testator died indebted by specialty several 1000 pounds beyond all his assets; whereupon Ld.

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Ld. C. King ordered the petition of the new assignees to be dismissed, and directed them to bring their bill. 2 Wms's Rep. 546. Trin. 1729. Ex parte Markland.

8. 5 Geo. 2. cap. 30. §. 23. If debts sworn to (*and by reason whereof a commission is awarded*) shall not be really due, or, if after such commission taken out, it cannot be proved that the party was a bankrupt, then the Lord Chancellor shall, upon petition of the party grieved, order satisfaction to be made for the damages sustained; and, in case there be occasion, assign such bond to the party, who may sue for the same in his own name.

9. §. 24. Commissions fraudulently obtained to be superseded, and another granted.

10. §. 45. No commission of bankrupt shall abate by the demise of his majesty, his heirs or successors, but shall continue in force; and if it shall be necessary to renew any commission by reason of the death of the commissioner, or any other cause, such commission shall be renewed, and but half the fees usually paid, shall be paid for such renewed commission.

11. A commission of bankruptcy issues against H. at 11 of the clock in the morning; at 3 in the afternoon the commissioners declare him a bankrupt, and execute an assignment at 6, and then have notice that he died at 10 o'clock that day, this is a dealing within the act of parliament, and the proceedings shall stand. Ld. Chancellor said, he knew no particular act as distinct from another which can be called a dealing. It has been said, that the declaring him a bankrupt was the act meant, but that declaration of the commissioners being only discretionary and for caution, and not at all binding to any body, it is not probable that the act should intend that only a dealing, which it has not any where given the commissioners power to do; whatever is done in pursuance of the commission is a dealing in it, if never so minute; and the rather for these being remedial laws, are to be beneficially construed in favour of the creditors, I cannot therefore put a narrow constrained construction upon the words dealt in, in order to overthrow this commission, and all the just right of the creditors claiming under it. Cases in Equ. in Ld. Talbot's time, 184. Hill. 1735. Warrington v. Morton.

[69] (H) Who are Creditors; and How, and When, to prove their Debts.

1. **O**. And B. were sureties for one C. for the payment of money, and had counter-bonds to save them harmless; the money was not paid at the day, and the sureties paid it; and afterwards C. became bankrupt, and whether they were creditors within the statute, was the question. And it was resolved, that they were. Cro. J. 127. Trin. 4 Jac. B. R. Osborn & al v. Churchman.

2. A creditor offered proof of his debt, which the commissioners disallowed; whereupon application was made to the court, who at first declined to meddle with it, but at length consented to hear the proof. Chan. Cases. 275. Pasch. 28. Car. 2. Anon.

3. A. lent money to a bankrupt, after a commission of bankruptcy sued out against him. Trevor and Hutchins, lords commissioners, held, that he could not come in as a creditor, but was excluded. But Lord Rawlinson doubted, and took it to be a new point, not yet settled, and that there were no words in the act to exclude him. But Ld. Trevor and Hutchins held, that when the commission was sued out, he was bound to take notice. 2 Vern. 157. r61. Trin. 1690. Hitchcox v. Sedgewick.

4. If there be an act of bankruptcy committed, and a creditor obtains a judgment subsequent to it, then a commission is taken out; now the judgment is thereby avoided. At Nisi Prius coram Holt. 12 Mod. 446. Pasch. 13 W. 3. B. R. Anon.

5. A. lends money to B. and C. on their bond; B. becomes bankrupt. The commissioners assign the estate in trust for the creditors. A. sues the bond against C. and gets judgment, and takes him in execution by a ca. sa. and thereupon C. paid A. 24l. but being old and poor, A. consented to discharge him out of custody. Ld. C. Harcourt decreed A. to come in as a creditor for a moiety of what remained due on the bond; for the execution being subsequent to the assignment of the bankrupt estate, shall not (at least in equity) discharge A's demand out of the bankrupt estate. But because each, in equity, was liable but to half the debt, and C. was not the original debtor for the whole, A. shall have relief only for a moiety of his remaining debt against the assignees; but had the bankrupt been the original debtor, and had borrowed all the money, then A. should come in before the assignees, as a creditor, for all his debt. Wms's Rep. 237. Trin. 1713. Ex parte Smith.

6. If a man trade with a bankrupt between the act of bankruptcy and the commission sued out, whether by delivery of goods, or payment of money, without notice of the act of bankruptcy, the bankrupt keeping open trade, such person shall come in as a creditor for such goods or money. Trin. 1716. Crolley's case.

7. On a petition to Ld. Chancellor Parker, praying to be admitted a creditor on a note, payable at a future day, given for goods sold and delivered, the commissioners having refused to admit him as such, in regard the bankruptcy was between the date of the note, and time of payment. Objection, that there was a difference between a bond and a note, for a note did not import any debt till the day of payment came.

But per Ld. Chancellor, this comes improperly before me for my determination, on a petition, I having nothing to do in such cases, but to direct and see that the commissioners do their duty, and cannot order them to admit any one creditor; but I may say so much money in their hands as will answer the proportion of the debt, in case it should be allowed of, and a bill may be brought for that purpose, in order to determine if the case be of great consequence.

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By 7 Geo. cap. 31. a creditor in such case is to be admitted, upon a discount or rebate; but no such creditor is to join in a petition for a commission.—Mich. Vac. 1726. the East India Company pray

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ed: by petition to be admitted as a creditor on a sale of their goods at a future day; but refused, being a case not within this act, and petition dismissed without prejudice to their seeking to recover at law. *M. B. The East India Company in this case insisted on several allowances, as interest, warehouse-room, &c.*

but not allowed; for even in a case of a bond no consideration shall be had, or allowance made for interest after the time of the bankruptcy.

quence. For by this means a trader may disappoint which of his creditors he pleaseth, and postpone them, by giving of some notes payable at a future day, and then becoming a bankrupt. I do incline to relieve such creditors, especially *where the note is given for goods sold*, and these notes are a sort of specialty. Objection, that he might plead certificate and discharge at law, if an action were brought upon such a note. But per Cur. that is not so because the cause says, *causa actionis* accrued before the bankruptcy, which cannot be in this case till the money is payable; and why may not such a note for a precedent debt be said *debitum in presenti & solvendum in futuro*? As to the honesty of the note, that may be enquired into, and will be no objection, because the honesty of a judgment bond, &c. are liable to the same enquiry. And though this note were given to one S. who is now abroad, yet it being now assigned to another, there is no occasion or necessity for an inquiry on what terms it was given him, and to call him to be examined to it, because *prima facie* it carries the face of truth. It is usual not to grant a commission on the petition of creditors on such notes, till the day of payment comes. Trin. 6. Geo. Canc. Burdock's case.

8. A creditor on a bond with condition to pay money at a future day, subsequent to an act of bankruptcy, could not before 7 Geo. 1. cap. 31. be admitted to prove such debt, or to have any dividend before such security became payable: and that act recites it to have been a question, for remedy whereof that act was made; and so was the opinion of all the judges. 2 Ld. Raym. Rep. 1549. Mich. 2 Geo. 2 B. R. in case of Tully v. Sparkes.

9. 5 Geo. 2. cap. 30. S. 26. *At such meeting as shall be appointed, the commissioners shall admit the proof of any creditor's debt, that shall live remote from the place of such meeting, by affidavit, or solemn affirmation, and permit any person duly authorized by letter of attorney (oath or affirmation being made of the execution thereof, either by an affidavit sworn, or affirmation made, before a master in Chancery, ordinary or extraordinary, or before the commissioners viva voce; and in case of creditors residing in foreign parts, such affidavits or affirmations to be made before a magistrate, where the party shall be residing, and shall, together with such creditor's letters of attorney, be attested by a notary publick) to vote in the choice of assignees in the place of such creditor.*

(I) Contingent and future Debts.

1. **I**N an action of debt upon a bond dated before the act of bankruptcy committed by the defendant, it appeared the money in the condition was not payable till after the act of bankruptcy; the defendant insisted he ought to be discharged upon common bail, by

by virtue of the statutes about bankrupts, but it was ruled he should be held to special * bail. 2 Ld. Raym. Rep. 1548, cites Pasch. 12 Ann. as the case of *Golding v. Golding*.

2. 7 Geo. 1. cap. 31. S. 1. Enacts, that every person who shall give credit or securities payable at future days, to persons who are, or shall become bankrupts, upon good consideration bona fide, for money or other thing not due before the time of such persons becoming bankrupts, shall be admitted to prove their securities or agreements, as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting 5 per cent. per ann. from the actual payment to the time such money would have become due.

A trader contracted with the East India Company, at one of their sales, for the purchase of a parcel of East India goods, to be paid for at a future day, and be-

3. And by S. 2. the bankrupt shall be discharged from such securities, as if such money had been due before the time of his becoming bankrupt.

before the day of payment he became bankrupt. Ld. Ch. King held this case not within the statute, because the goods were not delivered, nor the contract signed by the party. 2 Wms's Rep. 396. Mich. 1726. Ex parte of the East India Company.

And at this day, if a bond or note be given by a trader upon a contingency, and before it happens the trader becomes a bankrupt, and then the contingency happens, this is not within the act, neither shall the debt arising after the bankruptcy be satisfied under the commission; per Ld. C. King. Mich. 1726. 2 Wms's Rep. 397. in case of the East India Company.

Obligor in a bottomry-bond became bankrupt before the return of the ship, and the ship did not return before the distribution made; Ld. C. King held, that the obligee should not have benefit of the distribution upon the commission. 2 Wms's Rep. 499. Mich. 1728. Ex parte Caswell, ex parte Cazalet, ex parte Bateman.—See pl. 8 & 9.

4. Upon a treaty of marriage between the plaintiff's nephew and the defendant's daughter, a settlement was agreed upon, and articles entered into between plaintiff and defendant, and also before the marriage, the plaintiff by a separate writing, reciting, that a marriage was intended, and in consideration thereof, the plaintiff promised and agreed to pay the defendant 40l. a year by quarterly payments, during the plaintiff's life; but if the intended husband and wife, or either of them should die during the defendant's life, then the annuity to cease. This agreement was signed and sealed by the plaintiff; the marriage was had, and settlement made according to the articles. The plaintiff soon after became a bankrupt, and in all things conformed to the acts relating to bankrupts, and had a certificate confirmed; the defendant did not come in under the commission, but afterwards for two years and half's annuity, accrued since his bankruptcy, brought action of covenant; it was tried per Ch. J. King. The now plaintiff pleaded the bankruptcy and certificate, and it was strongly insisted, that it was within the statute of 7th of the present king, whereby persons intitled to notes payable at future days, should come in under the statute, and a value set on the debt, with rebate of interest, but Ch. J. was of opinion this agreement was not within the statute. The rather, because of the impossibility of setting a value on this annuity, being on three contingencies, and verdict for the now defendant, but upon the now plaintiff's importunity, the point was referred to be argued in the court of C. B. which was done accordingly, and all the judges were of the same opinion. Plaintiff brought a bill for injunction.

1st. On suggestion that this agreement was a fraud being *private and not in the articles.*

2dly, For that the verdict was against conscience, for that the now defendant *ought to have come in under the statute*, being within the late act; but on motion for continuing the injunction the Master of the Rolls said, had it been *res integra* he knew not what he might have done, but now the point was determined at law, so disallowed the cause, for that there was no fraud. MS. Rep. Trin. 9 Geo. 1723. Fletcher v. Bathurst.

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5. A *contingent creditor*, as where obligor in a bottomree-bond becomes a bankrupt, shall not be barred by the allowance of the bankrupt's certificate, the right of action not being then accrued. 2 Wms's Rep. 499, pl. 159. Mich. 1728, per Ld. C. King. Ex parte Caswell.

Barnard.
Rep. in
B. R. 59.
S. C. the
court said,
that the stat.
7 Geo. 1.
cap. 31. ex-
tends only
to creditors
at a future
day certain,
and not to
mere con-
tingent cre-
ditors as
this case is,

6. If J. S. gives a *bond* to certain persons conditioned for *payment of so much in case he shall marry such a woman, and that she shall survive him, but in trust for the said woman her executors, &c.* and afterwards J. S. marries her, and becomes bankrupt, and ~~has~~ his certificate of discharge and dies, living his said wife. The court held, that this was not barred; for that it was not within the 7 Geo. 1. cap. 31. it being uncertain whether this bond should ever become payable or not, by reason of its *depending on two contingencies*, which had not both happened at the time of the act of bankruptcy committed; and so was impossible to make abatement of 5l. per cent. as the act directs. 2 Ld. Raym. Rep. 1546. Mich. 2 Geo. 2. B. R. Tully v. Sparks.

and that it seemed clear he could not be prejudiced for not coming in; for if he had come in it would have done him no service; and judgment for the plaintiff nisi, and says, that this matter came on again the next term, and the court was of the same opinion.

7. Edward Cork on *Marriage*, by articles in 1716, *covenanted to pay trustees 4000l. in case he should die leaving a son and other children who should arrive to 21 equally, &c.* E. becomes a bankrupt and has a son, and four other children all infants who prefer petition, praying that sufficient part of the estate might be set apart in order to be divided, when, &c. Lord Chancellor: It is uncertain whether ever any thing will become due, and before 7 Geo. 1. cap. 31. it was a question whether *bonds* or promissory notes payable at a future day, though certain in all events, could be let in, and the difference now in such cases is to be adjusted by rebate of interest, but here how is it possible to adjust the difference upon a *contingency which may never happen?* He allows the case upon bottomree-bonds, where contingency had happened before a distribution actually made. Obj. that this demand will be discharged by certificate by statute 5 Geo. 2. cap. But per Ld. Chancellor, that clause only relates to inrolling proceedings, and this is not a debt due or arising at the time of the bankruptcy. Petition dismiss. MS. Rep. Trin. 1734. Ex parte Jefferies.

8. Statute 19 Geo. 2. enacts, *that from and after the 29th day of October, the obligee in any bottomree-bond, or respondentia bond, and the assured in any policy of insurance made and entered into upon*

upon a good and valuable consideration bona fide, shall be admitted to claim; and after the loss or contingency had happened, to prove his, her, or their debt and demands, in respect of such bond or policy of insurance, in like manner as if the loss or contingency had happened before the time of issuing of the commission of bankruptcy against such obligor or insurer; and shall be intitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if such loss or contingency had happened before such commission issued.

9. And that all and every person or persons against whom, from and after the said 29th day of October, any commission of bankruptcy shall be awarded, shall be discharged of, and from the debt or debts owing by him, her, or them, on every bottomree or respondentia bond, and shall have the benefit of the several statutes now in force against bankrupts, in like manner to all intents and purposes, as if such loss or contingency had happened, and the money due in respect thereof, had become payable before the time of the issuing such commission.

(K) Who must come in as Creditor. [73]

1. **A.** SELLS land to B. who afterwards becomes a bankrupt, part of the purchase money not being paid; A. shall not be bound to come in as creditor under the statute, but the land shall stand charged with the money unpaid, though no agreement for that purpose. Vern. 268. pl. 262. Mich. 1684. Chapman v. Tanner.

2. A. makes a mortgage, and afterwards a commission of bankruptcy is taken out against him, and commissioners make an assignment of his estate, and then B. lends 2000l. to the bankrupt on a second mortgage, having no notice of the bankruptcy, and afterwards he gets in the first mortgage. This prior mortgage shall not protect the mortgage subsequent to the bankruptcy. 2 Vern. 157. Trin. 1690. Hitchcox & al' v. Sedgwick & al'.

3. Clothier become bankrupt, the question was, whether his factor, having cloaths in his hands of the bankrupts, might thereout retain his debt, or must come in as a creditor under the statute, and accept of a satisfaction in proportion with other creditors; and account for the cloaths he had in his hands. 2 Vern. 254. Hill. 1691. Woodford v. Swaine.

A merchant remits goods to his factor, and about a month after draws a bill, then the principal

breaks, against whom a commission of bankruptcy is awarded, and the goods in the factor's hands are seized, it has been conceived the factor must answer the bill notwithstanding, and come in as a creditor for so much, as he was enforced by reason of his acceptance, to pay. Molloy, 465. S. 8.

4. A. by articles was to build certain houses. B. furnishes him with materials, and takes an assignment of the articles for his security, but before the assignment A. was a bankrupt.

Ld. Chancellor, B. has a special equity, inasmuch as, by what he advanced, A. was enabled to perform his agreement to the common benefit of the creditors, and therefore B. shall have all his

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money be advanced after he had a specifick interest in the articles, but as to what he gave credit for before, he trusted as another creditor.

And Ld. Chancellor put the case of *A. in building a ship, he becomes bankrupt, and after B. furnishes materials to finish it. B. shall have all his money, and not come in average with the other creditors.* MS. Rep. Pasch. 1715. on a rehearing. *Langton v. Hall.*

5. *A. seised in fee, borrowed money of J. S. on a judgment, and then article~~d~~ for sale of the lands to B. and afterwards became bankrupt.* The question was upon stat. 21 Jac. 1. cap. 19. S. 9. *the judgment not being executed before the bankruptcy, 650l. part of the purchase money remained unpaid. It was decreed at the Rolls that the assignees convey the premisses to B. as A. had article~~d~~ to do, and thereupon B. to pay the assignees the 650l. for the benefit of the creditors; and J. S. to come in for a proportion only with the rest of them.* Wms's Rep. 737. Mich. 1721. *Orlebar v. Fletcher and D. of Kent.*

But though J. S. could not come in upon the bankrupt's estate for more than his proportion with the other creditors, yet it was insisted, that he would be at liberty to extend his judgment against the purchaser who bought the land prior to the bankruptcy, which seemed to be admitted; but that B. could not be deemed a purchaser till he had paid the remainder of the money, which, when paid, must go to the creditors, and that he was not compellible to pay it, unless upon his having a good title made him by the assignees, who had the legal estate of the premisses assigned to them by the commissioners, and so decreed as above. Ibid. 739.

[74] 6. *P. had a current account with B. a banker, and had 3000l. in B's hands; B. paid P. 1000l. and P. instead of a receipt gave B. a promissory note; B. assigned the note to H. and afterwards B. became a bankrupt. H. sued the note, and P. not being able to prove on the trial, that B. was bankrupt at the time of the assignment, H. recovered. P. brought a bill for an injunction, and for a discovery, whether the assignment was not made after the time it bore date. It was insisted that though this was a promissory note it should be considered only as a receipt, he having at that time money in his hands, and could not be imagined he intended to be liable on the note at the same time that so much money was due to him; and if so, the 1000l. should be taken as so much money paid and deducted out of the 3000l. so should come in for his distributive share of 2000l. of the bankrupt's estate, and not be a creditor for 3000l. and pay the 1000l. note; no proof was made of bankruptcy at the time of the assignment, only that he could not pay it, but never kept out of the way. Ld. Chancellor, that does not amount to an act of bankruptcy; and if people are so careless to give notes instead of receipts, it is more fit they should suffer than innocent people who know nothing of their transactions; bill dismissed. Select Cases in Chanc. in Ld. King's time. 42, 43. Trin. 11 Geo. 1. *Pakenham v. Bland and Hoskins.**

7. *On a distress for rent, goods were sold and 77l. 3s. remained in the constable's hands, who became a bankrupt. The tenant dies, and his executor prays to be paid this money by assignees in preference to other creditors.*

Obj.

Obj. this comes to the hands of the constable by due course of law, and cited Mar. 9. 1721. *Ld. Macclesfield ex parte Peirson*, where was cited *Wright v. Dixon*, Mich. 6 Geo. 1. C. B. *Goods taken in execution by Wilcox bailiff of Westminster and he died; judgment and execution set aside*, and ruled by B. R. that the widow and executrix of W. should refund the money though she alledged she had not assets to pay specialties.

But per *Ld. Chancellor* both the cases cited are against executors, and though the law makes a difference between one creditor and another; yet in case of bankruptcy all creditors are upon an equal foot, if any thing remained in specie, it might be otherwise, but here the money is embezzled by the constable; so ordered the petitioner to come in as a creditor with the rest. MS. Rep. Mich. Vac. 1733. Ex parte Dobson.

8. An attorney had been employed by one who became bankrupt; Assignees petition to have up papers, and that the attorney might come in for his demands *pari passu* with other creditors.

Ld. Chancellor, the attorney hath a lien upon the papers in the same manner against assignees as against the bankrupt, and though it doth not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law; but as to papers received after the bankruptcy they cannot be retained, and therefore if the assignees desire it let the bill be taxed, and upon payment, papers delivered up; and although the attorney had come in and proved his debt, yet a creditor, who hath a security, may properly come in and prove his debt, because possibly his security may prove deficient. MS. Rep. Mich. 1734. Ex parte Bush.

9. A. being collector of land-tax, and in arrear, becomes bankrupt. His goods are seized by warrant from commissioners of the land-tax; then an assignment is made, but it was before sale by the commissioners of the land-tax.

Per Cur. this is to be considered as a prerogative case, and the collector is an officer and debtor to the crown, and as in case of an extent, a seizure before assignment is good and binds, so here. [75] But in case of a common person it seems contra, and the assignment of commissioners of bankrupt would have been good.

Objected, that the collector was not to be looked upon as an officer, or debtor of the crown, because in case of failure the county is to make it good, sed non allocatur; for the duty is given to the king, and his salary, &c. arises from the duty, &c. MS. Rep. Mich. 1734. B. R. *Bracey v. Dawson*.

(L) Creditors. At what time to come in.

1. 1 Jac. 1. cap. 1. *ANY creditor may come in within four months after the commission sued forth, and until distribution be made, so that he contributes to the charges of the commission, and if the creditors come not within four months, the commissioners may proceed to distribution.*

After distribution, and four months, it was admitted, Arg. that other creditors could not come in to disturb the first distribution, but might come in for the residue, of which no distribution was made.

2. A commission of bankruptcy was taken out against T. F. the 17th of November 1676, but prosecuted only by R. the other creditors consenting, that execution of the commission be forboren a month, but R. did not consent thereto, nor knew thereof, but R. prosecuted and sued M. who had possessed the estate by assignment of the bankrupt. It was insisted at the trial, that F. (the supposed bankrupt) was not so. R. had a verdict, and the four months were out; three weeks after, the petitions to be admitted into the distribution, and now would contribute to the charges, the suspension of executing the commission having been so ordered by the Chancellor; and now his lordship directed her to be admitted into contribution. Chan. Cases 307. Pasch. 30 Car. 2. in Canc. *Rushworth v. Forth.*

3 Chan. Cases 153, 154. Mich. 35 Car. 2. *Harding v. Marsh.*

(M) Of joint or separate Commissions in respect Partners in Trade Bankrupts. And how to proceed therein.

1. A JOINT commission was taken out against two joint traders bankrupts. The commissioners assign the real and personal estate of them, or either of them. Afterwards the separate creditors take out separate commissions against them, and the separate commissioners assign the separate effects and estate to other assignees. Upon petition by the separate assignees for liberty to sue at law for the separate estate, Ld. C. King thought the first assignment passed as well the separate as joint estate, and that the second assignees could do nothing at law, and so denied the petition, but would not hinder their joining in a bill for an account in equity. 2 Wms's Rep. 500. Mich. 1728. Ex parte Cook.

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2. A petition came on before the Ld. Chancellor on the behalf of D. There was a separate commission taken out against one P. only; and a petition by a creditor on the partnership estate. The order pronounced was, that the partnership estate should be divided amongst the partnership creditors in the first place; and if there should be any surplus of this estate due to the bankrupt, that the surplus, together with his separate estate, should be divided amongst his separate creditors; that on the other hand, the separate estate should in the first place be divided amongst the separate creditors; and if there should be any surplus from that, that that surplus, together with the partnership estate, should be divided among the partnership creditors. Barnard. Rep. in B. R. 470. Arg. cites 23 December 1728, the case of *Mackenson v. Parker.*

3. If A. and B. joint traders, become bankrupts, and there are joint and separate commissions taken out against them, and A. and B. before the bankruptcy, become jointly and severally bound to J. S.—J. S. may chuse under which commission he will come, but shall not come under both. 3 Wms's Rep. 405. Hill. 1735. Ex parte Rowlandson.

4. But

4. But if two joint traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt; here the joint debt may be sued for by the partnership creditor, who may likewise sue the bond given by one of the traders. 3 Wms's Rep. 408. Hill. 1735. Ex parte Rowlandson.

(N) Commissioners. Who may be. And how to qualify themselves.

1. JOHNSON was both clerk and commissioner to a commission of bankruptcy, by which means he had fees for both, and thereby four commissioners were always present, including the clerk, whereas three are sufficient. On petition he was removed. Select Cases in Canc. in Ld. King's time 46. Trin. 11 Geo. Wood's case.

2. 5 Geo. 2. cap. 30. S. 43. The commissioners shall not be capable of acting until they respectively shall have taken an oath to the effect following, viz. I A. B. do swear, that I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me as a commissioner in a commission of bankrupt against and that without favour or affection, prejudice or malice.

So help me God.

3. S. 44. Which oath any two of the commissioners are empowered to administer to each other, and they are required to keep a memorial thereof, signed by them among the proceedings on each commission.

(O) Commissioners. Their Fees and Allowances.

1. 5 Geo. 2. THERE shall not be paid out of the estate of cap. 30. S. 42. the bankrupt any monies for expences in eating and drinking, of the commissioners or of any other person, at the times of their meeting of the commissioners or creditors; and if any commissioner shall order such expence to be made, or eat or drink at the charge of the creditors, or out of the estate of such bankrupt, or receive above 20s. each commissioner for each meeting, every such commissioner shall be disabled to act in any commission of bankrupts. [77]

2. S. 46. All bills of fees or disbursements demanded by any solicitor employed under any commission of bankrupts shall be settled by one of the masters in Chancery, and the master who shall settle such bill, shall have for his care in settling the same, as also for his certificate thereof, 20s.

3. On a petition to the Ld. Chancellor in Feb. 1739, in the case of Edward Haliday a bankrupt, against several of the commissioners for taking more than 20s. apiece at each meeting, and likewise ordering great sums of money to be charged for their

eating and drinking, his lordship declared them incapable by virtue of this act to be any longer as commissioners in the execution of the said commission, and that no further proceedings ought to be had thereupon, and also that all further proceedings on the present commission be absolutely stayed, and that the petitioners be at liberty to apply to his lordship by petition, to have the said commission renewed, and directed to such new commissioners to be named therein as he shall think fit, and for that purpose did order, that the solicitor for the petitioners, and the solicitor for the assignees, do respectively leave with his secretary to the commissioners of bankruptcy, the names of five persons whom they shall propose for his lordship's consideration, in order that proper persons may be appointed commissioners in such renewed commission: and did also further order, that the present assignees, under the said commission, be removed from being assignees of the said bankrupt's estate and effects, and that the said bankrupt's creditors do proceed to a choice of new assignees in their room, and for that purpose, after the said commission shall be renewed, an advertisement is to be published in the London Gazette, appointing a meeting of the creditors of the said bankrupt for choice of such new assignees, and after such choice shall be made, his lordship did order, that the surviving commissioners in the present commission, or any three of them, and the said assignees so hereby removed, do join with the major part of the commissioners to be named in the renewed commission, in making an assignment of the said bankrupt's estate and effects, to the new assignees so to be chosen; and did further order, that forthwith after the execution of such assignment, the said old assignees do respective deliver over to the new assignees, all the effects of the said bankrupt, remaining in specie in the hands, custody, or power of them, or any of them, upon oath, and also all books, papers, and writings in their respective hands, custody, or power, relating to the said bankrupt's estate or effects, upon oath, and that the said old assignees do deliver possession of the said bankrupt's real estate to the new assignees, and did further order, that the said old assignees petitioned against (naming them) do, out of their own pockets, pay to Mr. Scurry, solicitor for the petitioners in this matter, the costs of the petitioners present application, and the costs of renewing the said commission, to be taxed by Mr. Burroughs, one of the masters of this court, in case the parties shall differ about the same.

[73] (P) Commissioners and Assignees Power as to discovering.

1. 13 Eliz. cap. 7. S. 2. **G**IVES power to the commissioners, or the most part of them, to take by their discretions order with the body of the bankrupt by imprisonment.
2. S. 5. If any after such act committed, and complaint thereof made to the commissioners, or the major part of them, by any party *grieved,*

grieved, suspecting any of the goods or debts of such offender to be in the possession of any person, or any persons to be indebted to such offender, do make relation thereof to the commissioners, they shall have power to call before them by such process, or means, as they shall think convenient, all such persons so supposed to have any such goods or debts in their custody, or supposed to be indebted to such offender, and upon their appearance to examine them, as well by their oaths, as by such means as the commissioners shall think meet, for the knowledge of all such goods and debts.

3. S. 6. If such persons upon examination do not disclose the whole truth of such things as they shall be examined of, or deny to swear, then such persons upon proof made before the commissioners by examination, or otherwise, shall forfeit double the value of all such goods and debts by them concealed; which forfeiture shall be levied by the commissioners of the lands, goods, and chattles, of such person so denying to swear, or not disclosing the whole truth, in such manner as is before appointed for the principal offenders, the same forfeitures to be distributed for satisfaction of the debts of the creditors in such rate as before declared.

4. S. 7. And every person fraudulently claiming or detaining any debt, goods, or chattels of the bankrupts, which are not really due, or belonging to him, shall forfeit double the value he shall so claim, or detain, to be levied and employed as aforesaid.

5. 1 Jac. cap. 15. S. 6. The commissioners may call before them the bankrupt; and if upon warning left in writing three times at the dwelling-place, where the bankrupt, his wife, or family, for the most part of his abode, did remain, within one year next before he became bankrupt, the said bankrupt shall not appear before the commissioners, it shall be lawful for the commissioners to appoint to proclaim the said party a bankrupt, at such publick places where the commissioners shall think meet, warning him to appear before them upon the commission, at some time appointed; and if upon five proclamations, the party offending appears not before the commissioners, and yield his body; the commissioners may award a warrant, to such persons as they think meet, to apprehend the body of the offender, and to bring him before the commissioners, wheresoever the party may be found, in place privileged or not, to be examined.

6. S. 7. It shall be lawful for the commissioners to examine the said offender upon interrogatories touching the lands, goods, debts, books of account and such other things as may tend to disclose his estate, or secret grants, and eloining of his lands, goods, money, and debts, as they shall think meet.

7. S. 10. If any persons known or suspected to detain any of the lands, hereditaments, goods, or debts of the bankrupt, or to be indebted to, or for the benefit of the bankrupt, shall, after lawful warning to the said persons given to come before the commissioners to be examined, refuse to come, or shall not come at the time appointed, having no lawful impediment, (such as shall be allowed of by the commissioners, and which shall be then made known to the commissioners) or having knowledge of any other meeting of the commissioners shall not appear before them at such time as they may, or being come shall refuse

refuse to be sworn, and make answer to such interrogatories as shall be ministred; it shall be lawful for the commissioners to commit to such prison as to them shall be thought meet, all such persons as shall refuse to be sworn and make answer, and also to direct their warrants to such persons as to them shall be thought meet, to apprehend such person as shall refuse to appear, and to bring them before the commissioners to be examined, and upon their refusal to come, or to be examined, to commit the party, so refusing, to such prison as the commissioners shall think meet, until the said person shall submit himself to the commissioners, and be by them examined according to the statute 13 Eliz. and this present act.

8. S. 11. *Provided that such witnesses as shall be sent for, shall have such costs as the commissioners shall think fit, to be rateably borne by the creditors. And if any person, other than the bankrupt, either by subornation of others, or his own act, shall wilfully and corruptly commit wilful perjury by his deposition to be taken before the commissioners; the party so offending, and all persons that shall unlawfully and corruptly procure any such unlawful, wilful and corrupt perjury, may therefore be indicted in any of the king's courts of record, and shall suffer such pains as are limited by the statute concerning perjury, 5 Eliz. cap. 9.*

9. E. was found to be a bankrupt by 13 Eliz. cap. 7. and was committed to the fleet, the warrant to the warden of the fleet was, to retain and keep in prison, to answer and to satisfy all such matters as shall be objected against him. The question now was, if the commissioners may license him to go at large to treat about his debts. By the court, if the warrant had been, that the party should have been in execution, then he could not be enlarged; but the court advised them to take security, lest he should withdraw himself; but if one had judgment against a bankrupt, and, upon a habeas corpus brought, he is committed in execution without a capias utlagat, then the commissioners cannot deal with him any more for to enlarge him. Noy 140. Mich. 4 Jac. C. B. Edwards's case.

10. 21 Jac. 19. S. 6. *The commissioners shall have power to examine the wife of the bankrupt upon oath for the discovery of his estate, goods, and chattels, and such wife refusing to appear, or to answer interrogatories, shall incur the same penalties as are provided against other persons in the like cases.*

3 Keb. 837.
pl. 74. The
King v.
Jeakill,
S. C. and
because it
did not ap-
pear that
those that
committed
him were a
majority,
or a quo-
rum, Rain-
ford and
Jones held
it ill, and
discharged

11. J. brings his *habeas corpus*; the return was, that he was committed by J. S. J. N. J. T. (to whom, and others, a commission of bankrupt was awarded) for refusing to answer a question put to him, concerning the bankrupt's estate, &c. and so commissus fuit in custodia by warrant to the officer, *virtute commissionis præd' & hæc est causa captionis seu detentionis, &c.* Three exceptions were taken to the return. 1st. For that there did not appear a sufficient authority; for the commission is said to be granted to them and others, and then they could not act without the rest; for the return does not express any *quorum*, &c. in the commission. 2dly, Instead of *commissus in custodia*, it ought to be *captus*, for that is the usual form; for this is, as if the commitment were by the officer that makes the return. 3dly, *Hæc est causa captionis seu*

seu detentionis is uncertain; for it ought to be *et detentionis*. And upon the first and last exception, the prisoner was discharged by the court, but told him, that he must answer directly to such questions as were put to him, in order to the discovery of the bankrupt's estate, or else he was liable to be committed. Vent. 323. 324. Mich. 29 Car. 2. B. R. J's case.

him, (the other justices being absent) in regard he did not refuse to swear, but had sworn,

that he had none of the bankrupt's estate in his hands, but *would not answer whether any of the bankrupt's estate came to his hands before the commission sued out, &c. having received his own debt before, nor per Cur. is he compellable to swear so upon 1 Jac. cap. 15. S. 10.

12. A person once examined by commissioners of bankrupts, cannot be examined again without a new commission. 2 Show. 102. Pasch. 32 Car. 2. B. R. The King v. Ballet.

13. The defendant bought of P. jewels, plate, &c. for valuable consideration paid; P. became a bankrupt, and a commission was taken out against him, and the commissioners examined B. the defendant touching the goods what they were, and the value of them, but on pretence that he did not answer, the commissioners committed him; but on an habeas corpus in B. R. he was delivered. The answer before the commissioners being as to the time, &c. to his remembrance, and that he could not positively answer farther, and by consent he was again to attend and be re-examined, which he did. And now the plaintiff's bill is to have the defendant's answer in chancery, where he pleaded, that he had no goods of P's, but such as he really paid for before the commission issued against P. and that he had no notice of any act or thing by P. whereby he was a bankrupt, but truly paid for what he bought, &c. It was objected, he ought to answer the time of bankruptism, else the statute against bankrupts will be of little effect. E contra, it is no equity in such case to make a man pay twice. Lord Chancellor ruled the plea good, saying it is an infallible rule, that a purchaser for a valuable consideration shall never, without notice, discover any thing to hurt himself. But as to the point of bankruptism, whether that the defendant being formerly examined by the commissioners on oath, should be examined, or put to answer to the same matter here, the Chancellor seemed to be of opinion that he should; but the other point being clear, there was no debate on this point. 2 Chan. Cases. 72, 73. Mich. 33 Car. 2. Ferrat v. Ballard.

14. Equity will not compel a man to discover what goods he really bought of a bankrupt after the bankruptcy, and before the commission sued out, where the party has no notice of the bankruptcy. Vern. 27. pl. 23. Hill. 33 and 34. Car. 2. Abery & al' v. Williams.

15. B. was committed by commissioners of bankruptcy, and the conclusion of the commitment was, until he conform himself to our authority, and be thence delivered by due course of law. By Cowper it was objected, that the conclusion of the commitment ought to have been, until he shall submit himself to be examined upon interrogatories, according to the intent and meaning of the act; for being a special authority to commit, the words must be pursued. Here

the

the commissioners required B. to tell all that he knew touching the estate of the bankrupt and (that being too general) when and in what manner did you aid and assist in embezzelling the estate of the bankrupt (not whether he did aid or assist) and for not answering, they committed him. Holt Ch. J. said, the general questions may be well, if he cannot recollect any thing, it is a fair answer; now, if any of the questions were fair, there was just cause to commit for not answering them. He is not to answer any thing criminal; it is criminal to embezzle any goods after the bankruptcy, but not before. But held, if a man has intermeddled honestly and fairly without craft, he may and ought to discover it to avoid the penalty; it may be the word embezzlement may be too hard, but there is latitude enough for other questions tantamount? but here the prisoner must be discharged; for the conclusion of the commitment is ill. Here the conclusion should have been, till he shall submit, and be (or to be) examined touching the premises, or (as Mr. Cowper said) upon interrogatories. Note, something was said at the bar of an action of false imprisonment. Per Holt Ch. J. There is no colour for an action of false imprisonment, where an officer commits such a mistake or slip. Comb. 390, 391. Mich. 8 W. 3. B. R. Bracy's case.

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16. The defendant was committed by the commissioners of bankrupts for not answering and making a discovery of his estate; and being in court upon an habeas corpus, he produced affidavits that he had made a discovery, and moved to be discharged, but it was denied; for if the commitment was illegal, he might have an action of false imprisonment, and per Curiam, the statute empowers the commissioners to examine the party upon interrogatories, which they must prepare and tender to him ready drawn; and this not being returned on the habeas corpus, the warrant for commitment was held void. 5 Mod. 368. Mich. 9 W. 3. B. R. Gregory's case.

17. H. was brought into B. R. upon a habeas corpus; and the return was, that she was committed by commissioners of bankrupts, for refusing to be examined by them; and the conclusion of the warrant of commitment was, that she should remain in custody, until she should be otherwise discharged by due course of law; and by reason of this conclusion, the court held the commitment to be ill, and discharged the defendant; because the power given by the statute 1 Jac. 1. cap. 15. is to commit the party, until he submit himself to the commissioners, and shall be by them examined. And there is no mention made of being discharged by due course of law. And for this exception Bracy committed for such account was discharged. 2 Ld. Raym. Rep. 851. Hill. 1 Annæ. Hollingshead's case.

18. Though the assignees under the statute of bankruptcy were disabled from recovering the effects belonging to the bankrupt's estate by a fraud in the defendants, viz. their having altered the bills of lading and invoices, and even the ship's name, that the assignees might not know or discover the goods, that were assigned to B. the bankrupt; yet there the Ld. Keeper refused to direct an issue,

issue, saying, it was a matter triable at law, and refused to direct that the statute of limitations should not be given in evidence. 2 Vern. 504. pl. 452. Trin. 1705. cites the case of Peeres v. Bellamy.

19. 5 Geo. 2. cap. 30. §. 4. Every bankrupt, after assignees shall be appointed, is to deliver upon oath, or affirmation, before one of the masters of Chancery, or justice of peace, unto such assignees, all his books of accounts and writings not seized by the messenger of the commission, or not before delivered up to the commissioners, and then in his power, and discover such as are in the power of any other person that any ways concern his estate; and every such bankrupt, not in prison, shall after such surrender, be at liberty, and is required to attend such assignees upon notice in writing, in order to assist in making out the accounts of the estate.

20. S. 5. Every bankrupt having surrendered shall at all seasonable times, before the expiration of forty-two days or such further time as shall be allowed to finish his examination, be at liberty to inspect his books and writings, in the presence of some person to be appointed by the assignees, and to bring with him for his assistance, such persons as he shall think fit, not exceeding two at one time, and to make extracts and copies to enable him to make a full discovery of his effects, and the said bankrupt shall be free from arreits in coming to surrender, and from actual surrender for the said forty-two days, or such further time as shall be allowed for finishing his examination, provided such bankrupt was not in custody at the time of surrender; and in case such bankrupt shall be arrested for debt, or on any escape warrant, coming to surrender, or after his surrender, within the time before mentioned; then on producing such summons or notice under the hands of the commissioners, or assignees, and giving the officer a copy thereof, he shall be discharged; and in case any officer shall detain any such bankrupt, such officer shall forfeit to such bankrupt, for his own use, 5*l.* for every day he shall detain him.

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21. S. 6. In case any bankrupt be in custody at the time of issuing of the commission, and is willing to submit to be examined, and can be brought before the commissioners and creditors, the expence thereof shall be paid out of the bankrupt's estate; but in case such bankrupt is in execution, or cannot be brought before the commissioners, then the commissioners shall attend the bankrupt in custody, and take his discovery; and the assignees are required to appoint persons to attend such bankrupt in prison, and to produce his books and writings, in order to prepare his discovery; a copy whereof the assignees shall apply for, and the bankrupt shall deliver to their order ten days before such last examination.

22. S. 14. Upon certificate under the hands and seals of the commissioners that such commission is issued, and such person proved before them to become bankrupt, it shall be lawful for any of the justices of his majesty's courts of B. R. or C. B. or barons of the exchequer, and justices of the peace within England, and Wales, and town of Berwick upon Tweed, and they are required upon application made, to grant their warrants for apprehending such person, and him to commit to the common gaol of the county where
he

Creditor and Bankrupt.

he shall be apprehended, there to remain, until he be removed by the order of the commissioners; and the gaoler, to whose custody such person is committed, is required to give notice to one of the commissioners.

23. S. 16. It shall be lawful for the commissioners to examine every person, against whom any commission shall be awarded, touching all matters relating to the trade and effects of such bankrupt, and also to examine every other person duly summoned, or present, at any meeting of the commissioners, touching all matters relating to the person and effects of such bankrupt, and any act of bankruptcy committed by him; and also to reduce into writing the answers of such bankrupt, or other person, which examination the party examined is required to subscribe; and in case such bankrupt, or other person, shall refuse to answer, and shall not fully answer to the satisfaction of the commissioners, all lawful questions put by the commissioners, or shall refuse to subscribe his examination (not having a reasonable objection to the wording thereof, or otherwise to be allowed by the commissioners) it shall be lawful for the commissioners by warrant to commit him to such prison as the commissioners shall think fit, there to remain without bail, until such person shall submit himself to the commissioners, and full answer make to the satisfaction of the commissioners to all such questions as shall be put to him, and subscribe such examination as aforesaid.

24. S. 17. In case any person shall be committed by the commissioners for refusing to answer, or not fully answering any question, the commissioners shall in their warrant of commitment specify such question.

25. S. 18. In case any person committed by the commissioners warrant shall bring habeas corpus, in order to be discharged, and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court, or judge, before whom such party shall be brought by habeas corpus, by rule, or warrant, to commit such person to the same prison, there to remain, until he shall conform as aforesaid, unless it shall be made appear, that he has fully answered all lawful questions put to him by the commissioners; or (in case such person was committed for not signing his examination) unless it shall appear that the party had good reason for refusing to sign the same. And in case any gaoler, to whom such person shall be committed, shall wilfully suffer such person to escape, or to go without the walls or doors of the prison, such gaoler shall for such offence, being convicted by indictment, or information, forfeit 500l. for the use of the creditors.

[83] (Q) Power of Commissioners in seizing the Effects of the Bankrupt.

Resolved
by Ld. Pemberton at
Guildhall,
that com-
missioners

1. 21 Jac. 1. **I**T shall be lawful for the commissioners or any cap. 19. S. 8. **I** other persons, or officers, by them to be appointed by their warrant, under their hands and seals, to break open the houses, chambers, shops, warehouses, doors, trunks or chests of the
the

Creditor and Bankrupt.

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the bankrupt, *where the said bankrupt, or any of his goods or estate shall be reputed to be*, and to seise upon, and order the body, goods, money, and other estate of such bankrupt, *as by the said former laws are appointed, by imprisonment or otherwise, as to the commissioners shall be thought meet.*

of bankrupt cannot break open a house to search for the bankrupt's goods, un-

less it be the bankrupt's goods in the house of the bankrupt. 2 Show. 247. pl. 248. Mich. 34 Car. 2. B. R. Anon.

2. A merchant seised of lands, being indebted to several persons, *committed an act of bankruptcy, and was outlawed in 1645, and in 1648 sold his lands to the lessor of the plaintiff, and in 1649 was outlawed again; in 1653 a commission of bankruptcy was taken out against him, and in 1657 he was declared a bankrupt, and the commissioners sold the lands to the defendant, who entered and got possession; the principal question was, whether the commission taken out in 1653, whereupon he was found a bankrupt, should relate to the first acts of bankruptcy in the year 1643, so as to avoid the sale made by the bankrupt in the year 1648? It was resolved per tot. Cur. that the sale should not be defeated by an act of bankruptcy done before, if it was not done within five years before the suing out of the commission.* Lev. 13, Hill. 12 & 13 Car. 2. B. R. Radford v. Bludworth.

2 Sid. 69. Pasch. 1658. B. R. S. C. but no judgment or opinion of the court. —Ibid. 114. S. C. argued again, and Glyn Ch. J. said, that once a bankrupt and always a bankrupt, and he thought that

a new act of bankruptcy did not make him a new bankrupt, and ordered it to be argued again. —Ibid. 176. S. C. argued again, and Newdigate Ch. J. said, that they were divided in Ch. J. Glyn's time, and that perhaps they would now adjourn it into the Exchequer Chamber, and therefore persuaded the creditors to agree, and so they referred it to certain persons to end it that vacation; and if not then ended, they ordered that it should be argued again the first Saturday of the next term. —Keb. 11. pl. 25. Pasch. 13 Car. 2. S. C. argued by Newdigate as counsel for the defendant. But per Cur. the proviso is express, that the commission must be sued within 5 years after some time when he became a bankrupt, and his being so after the sale will not hinder, that if the commission be not sued out within 5 years of his becoming a bankrupt, and then they can only defeat all sales made within the 5 years, but not afterwards.

3. By 5 Geo. 2. cap. 30. S. 14. *Judges and justices of peace may grant warrants to commit the bankrupt to gaol, and the gaoler is to give notice of such person being in custody, and the commissioners are empowered to seise the effects of such bankrupt, (the necessary wearing apparel of such bankrupt, or of his wife or children excepted,) and his books or writings, which shall be then in the custody of such bankrupt, or of any other person in prison.*

(R) Assignees bound. By what Acts or Agreements of Bankrupt. [84]

1. **A** DJUDGED, that a *sale made of his goods by a bankrupt, after a commission of bankruptcy is awarded, is utterly void.* Mo. 594. pl. 805. Hill. 33 Eliz. Smith v. Mills.

Such contract after an act of bankruptcy, is not

merely void, but is good between the parties. 3 Salk. 19. pl. 2. Hill. 11 W. 3. B. R. Hussey v. Fidei.

2. A.

2. *A. was indebted to B. a bankrupt, and A. and B. became bound for this money to M. L. in trust for the bankrupt, a commission issued, and this debt was assigned to a creditor; M. L. died, and his executors released his debt.* The creditor brought debt, and adjudged that it lies; because the interest of this debt was transferred to the creditor, by the statute 21 Jac. cap. 19, the bond being made to the use of the bankrupt, and therefore *the release afterwards was no bar*; and so the bankrupt's being bound was not material, the bond being in trust for him. Palm. 505. Hill. 3 Car. B. R. Gerrard v. Aylmer.

3. *C. possessed of a lease for years, contracted with the committee of the company for a new lease, and paid part of the fine, and by C's consent a new lease was made to M. by the company, and to him executed, C. was at the time of the treaty, a bankrupt.* The question was, whether the commissioners could assign the lease to the prejudice of M.? and Drake's case was cited. The Lord Keeper ordered, that the plea and demurrer be ousted, and the benefit thereof saved till the hearing; he doubted of the lease; there were other matters for the benefit of M. also in the plea. 2 Chan. Cases 196. Pasch. 26 Car. 2. Street v. Mercer's Company and Mosse.

4. *A. mortgaged lands, and afterwards became a bankrupt.* The title of the mortgagee shall not be impeached by the commissioners or assignees of the statute of bankruptcy; decreed. Fin. Rep. 466, 467. Mich. 32 Car. 2. Tanner v. Chapman.

5. *Two joint traders, one of them became a bankrupt; per Holt Ch. J. the commissioners cannot meddle with the interest of the other, for it is not affected by the bankruptcy of his companion.* 3 Salk. 61. Pasch. 7 W. 3. Anon.

6. *A. becomes bankrupt, and then sells goods to B. B. sells them to C. which is a conversion; then a commission of bankrupts is sued, and an assignment made by the commissioners to E. who brings trover against C. Per Holt; the action well lies; but that point was also reserved for his consideration.* Ld. Raym. Rep. 741. at Lent assizes at Deptford, 16 Mar. 12 W. 3. Kirne v. Smith, & al'.

7. *D. the receiver of the New River rent assigned to the plaintiff by a bond, wherein the defendant S. and G. were bound to him in 700l. for payment of 350l. and this assignment was to indemnify him against two debts, for which P. stood bound as surety for D. and in satisfaction of 30l. he owed the plaintiff; D. became a bankrupt, so P. could not sue in the name of D. at law, and brought his bill to have the money decreed to him in equity. Defendant S. insisted, that D. is indebted to him for four New River shares, and insisted to retain it out of the bond; and the assignees insisted to have the bond, they being just creditors as well as the plaintiff, and had the law as well as equity, on their side.* Per Ld. Keeper, *the assignees can have no better right than the bankrupt himself*; and as the bankrupt is bound by the assignment, the assignees under the statute must be bound likewise, and stand in his place; but they insisting D. was a bankrupt before

fore be assigned the bond, he directed that to be tried at law; but said, he was in doubt whether *S. might not retain for his debt*, and that stoppage seemed to be a good equity in such case. 2 Vern. 428, 429. pl. 390. Hill. 1761. Peters & al' v. Soame, & al'.

8. C. about two months before bankruptcy, *having trust money, tallies, &c. in her hands, belonging to her children, makes a deed, declaring the trust* of what belonged to her children respectively, &c. The creditors would have set this aside. Ld. Chancellor said, it is a fair and honest proceeding, there can be no bankrupt in equity, but at law only. 10 Mod. 489. 498. Pasch. 8 Geo. Canc. Cock's case.

s Wms's Rep. 430. Mich. 1727. in case of Small v. Oudley, the master of the Rolls cited S. C. and said,

that Ld. Macclesfield declared, that this was so far from being an act of fraud, that it seemed to be just and commendable.

9. Appeal was from a decree of dismissal at the Rolls upon this case. The defendant Warner made a *lease* of an inn to A. for years, with a *proviso* in the lease, *that the lessee, his executors or administrators, should not assign the term to any person or persons, without the consent of the lessor, under his hand in writing, first had and obtained, with a power of re-entry in such case to the lessor, and that the lease should be void. Lessee dies, and his executor enters and enjoys the premises, and afterwards becomes a bankrupt. The commissioners assign this lease inter alia to the assignees chosen by the creditors, and afterwards in consideration of 50*l*, they assign to the plaintiff Goring, who brought this bill to be relieved against this proviso, and to stay proceedings in an ejectment brought by the lessor against him upon this proviso, &c.* The defendant Warner by his answer insists upon the forfeiture at law, and that the proviso was reasonable and ought not to be set aside in equity. Per Macclesfield C. I do not think this is a breach of the proviso or condition at law, but whether it be so or not, I think this is a proper case for relief in a court of equity. *I think the assignment by the commissioners is clearly no breach of the proviso, for that is done by authority of a statute, which will supersede any private agreement between the parties, inconsistent with it, and I am inclined to think the assignment over by the assignees is not a breach of condition; for the first assignment by the commissioners, is not a perfect and compleat assignment within the meaning of the statute, and passes only the legal interest subject to a trust to be sold and disposed of for the benefit of the rest of the creditors, and the disposition is not compleat, till sold by them for the benefit of the creditors. The first assignment is only formal, and in case of the commissioners, and in order only to make a sale thereof for the benefit of the creditors, and their assignees stand in the place of the bankrupt, and is in effect his assignee; and it is unjust and unreasonable that such a proviso should frustrate and overthrow the intent of a statute, made in favour of honest creditors, and deprive them of the advantage they may make of a beneficial lease. And though it was insisted, that the commissioners nor their assignees can be*

in no better a condition than the bankrupt himself, and consequently cannot assign over without licence, I think though that rule holds true generally, yet there may be some exceptions to it, and that the present case is an exception out of that rule, and decreed the plaintiff to hold and enjoy, and an injunction to stay proceedings at law. MS. Rep. Mich. 11 Geo. in Canc. *Goring v. Warner.*

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10. The law is very clear, that the assignees are exactly in the same place as the bankrupt, and stand in his place to every particular, and any agreement entered into shall bind them; and though there may not be the same remedy against them, that is not from the nature, but the necessity, of the thing; for he shall have an adequate and compleat satisfaction, as far as his fortune in the hands of the assignees will admit of. *Select Cases in Chan.* in *Ld. King's time*, 77. *Trin.* 2 Geo. 2. in case of — *v. Du Rhone.*

11. A bankrupt, whose estate is in mortgage, conveys the equity of redemption to a third person after an act of bankruptcy, but before the commission and assignment, this shall not defeat the assignees. But where a bona fide purchaser for a valuable consideration, and without notice, has a contest with the assignees, this court will not take any advantage from him, therefore not compel a discovery. A commission issued is notice of the bankruptcy. *Cases in Equ.* in *Ld. Talbot's time*, 65. *Hill.* 1734. *Collet v. De Gols and Ward.*

(S) Commissioners Power in selling, disposing, affuring, and assigning Estates, &c.

1. 13 Eliz. cap. 7. S. 7. **T**HE Lord Chancellor, upon complaint in writing, against persons being bankrupt, shall have power, by commission under the great seal, to appoint such persons as to him shall seem good; who, or the most part of them, shall have power to take by their discretions such order, with all his lands, as well copyhold as freehold, which he shall have in his own right before he became bankrupt, and also with all such lands as such person shall have purchased for money, or other recompence, jointly with his wife, or child, to the only use of such offender, or for such use, or title, as such offender then shall have in the same, which he may depart withal, or with any person of trust, to any secret use of such offender, and also with his money, goods, merchandizes and debts; and cause the said lands, &c. to be appraised to the best value, and by deed indented, inrolled to make sale of the said lands, &c. and of all debts touching only the same, belonging to such offender, and also of all fees, offices, goods, and chattles; or otherwise to order the same for satisfaction of the creditors; to every of the creditors a portion, rate like, according to their debts; and every direction, and other thing done by the persons so authorized, shall be good in law against the

The said offender, his wife, heirs, children, and such persons, as by joint purchase with the offenders shall have any estate or interest in the premises, and against all other persons claiming by, from, or under such offender, by any acts done after such person shall become bankrupt, and also against the lords of the manors, whereof the said copyhold lands be holden.

2. S. 3. *Provided that every person, to whom any such sale of copyhold lands shall be made, shall before they take any profit of the same; agree with the lords of the manors for such fines as have been accustomed to be paid; and upon such agreement, the lords at the next court, shall not only grant unto the vendees, upon request, the same customary lands, by copy of court-roll for such estate as to them shall be sold, reserving the ancient rents, customs, and services, but also admit them tenants, and receive their fealty.*

3. S. 11. *If any person declared a bankrupt by virtue of this act, shall at any time after purchase lands or chattles, or any lands or chattles shall descend or come to such bankrupts before their debts shall be fully satisfied or agreed for; the said lands and chattles shall by the commissioners be bargained, sold, extended, delivered and used for payment of the said creditors, in like manner as other the lands and chattles of the said bankrupts.*

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4. S. 12. *This act shall not extend to any lands which shall be assured by any bankrupt before he became bankrupt, so that such assurance be made bona fide, and not the use of the bankrupt himself only, or of his heirs, and that the parties to whose use such assurance shall be made, be not privy to the fraudulent purpose of such bankrupt to deceive his creditors.*

5. A debtor became a bankrupt, and after a commission awarded he sold part of his goods to one of his creditors in satisfaction of part of his debt, and afterwards the commissioners by indenture sold those goods jointly to the plaintiffs, who were the other creditors. It was resolved that the sale by the said commissioners was good, for the intent of the statutes is to relieve the creditors equally in distribution of the bankrupt's estate, and that he himself cannot dispose of his goods after the commission awarded; and if a creditor refuses to come into the commission, and the goods are sold to others, it is likewise good. 2 Rep. 23. Trin. 31 Eliz. B. R. Case of bankrupts.

Mo. 594.
pl. 805.
Smith v.
Mills, S. P.
and seems
to be S. C.
adjudged
accord-
ingly.

6. 21 Jac. 1. cap. 19. S. 10. *If any lands, goods, or other estate, of any bankrupt, shall be extended, after such time as he is become bankrupt, under colour of being an accountant, or indebted unto the king; it shall be lawful for the commissioners to examine upon oath, whether the said debt were due to such debtor or accountant, upon any bargain or contract originally made, betwixt such accountant and the said bankrupt; and if such bargain or contract was originally made with any other persons than the said debtor or accountant, or for the use and trust of any other person, it shall be lawful for the commissioners to dispose of all such lands, goods and debts so extended, for the use of the creditors.*

7. A. indebted to B. prevailed on C. to be bound with him, and for his indemnification; A. assigned several debts and cove-

a Vern. R.
428. Peters
v. Soames
S. P.

wanted not to release the same or any part thereof; A. became bankrupt; decreed the letter of attorney, by which the debts were so assigned, should be confirmed to C. against A. and all claiming under him. N. Ch. R. 22. 9 Car. 1. Meechet v. Bradshaw.

N. Ch. R.
103. S. C.
& S. P.—
2 Vern. 97.
in pl. 89.
S. P. cited
per Cur.
and says,
that it was

8. It has been ruled in Canc. that they may assign *an equity or redemption* of a mortgage, but *quære*; for it seems to be against the statute, which enables them to the benefit of a condition that is performed and not forfeited. Chan. Cases 71. Hill. 17 & 18 Car. 2. cited by Newdigate serj. in case of Drake v. Mayor of Exon.

for some time doubted.——Held per Hutchins commissioner, that the commissioners should have the *equity of redemption*. 2 Vern. 101. Trin. 1690. in case of Hitchcock v. Sedgwick.——2 Vern. 286. pl. 274. Hill. 1692. S. P. seems admitted.

Nelf. Chan.
Rep. 103.
S. C. in to-
tidem ver-
bis.——
S. C. cited
per Cur. as
adjudged
accord-
ingly.
2 Vern. 97.
in pl. 89.

9. A lessor and lessee for years, the *lessor covenants with the lessee and his assigns to renew*, then the lessee becomes bankrupt, and commissioners of bankrupt assign this covenant. The assignee brought this bill to have the defendant, the lessor, renew to him. The case was referred to Wyndham J. and Baron Turner, and they certified the plaintiff ought not to be relieved; and so he was dismissed. Chan. Cases 71. Hill. 17 & 18 Car. 2. in Canc. Drake v. the Mayor of Exon.

——S. C. cited per Cur. 2 Vern. 194. in pl. 176. as adjudged.

Vent. 360.
S. C. & S. P.

10. The commissioners of bankrupts have only a power to sell, and no estate, and to pass the estate there must not only be a *deed indented*, but the same *must be inrolled also*, and in this case there is no relation; for no time is mentioned within which it is to be done, so that it might extend to seven or twenty years, which would be dangerous. 2 Jo. 197. Pasch. 34 Car. 2. B. R. in case of Perry v. Bowers.

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2 Mod.
324. S. C.
according-
ly, by Holt
Ch. J. but
if they
bring the
one action
they shall
not after-
wards bring the other.

11. Sale of goods by a bankrupt, after an act of bankruptcy, is not merely void; the contract is good between the parties, but it may be *avoided, or not avoided*, by the commissioners or assignees at pleasure; therefore they may either bring *trouver* for the goods as supposing the contract to be void, or may bring debt or assumpsit for the value, which *affirms the contract*. 3 Salk. 59. pl. 2. Hill. 11 W. 3. B. R. Husley v. Fidel.

Gillb. Equ.
Rep. 140.
S. C.——
Equ. Abr.
84. pl. 7.
S. C.

12. When the commissioners have *assigned the bankrupt's estate and given the bankrupt his certificate* and discharge, they have executed their power, and the *debts*, which the bankrupt owed to the creditors before the bankruptcy, *are now extinct by act of parliament*; and a legacy given to the feme on a contingency and which happened after the bankruptcy, but was not assigned over before the certificate and discharge, is as a new acquired estate by the husband in right of his wife. Wms's Rep. 385, 386. per Ld. C. Parker, Mich. 1718. Jacobson v. Williams.

(T) Liable

(T) Liable. What.

1. 13 Eliz. cap. 7. **I**F any person, declared a bankrupt by virtue of this act, shall at any time after purchase lands or chattles; or any lands or chattles shall descend or come to such bankrupts, before their debts shall be fully satisfied or agreed for, the said lands and chattles shall, by the commissioners, be bargained, sold, extended, delivered and used for payment of the said creditors, in like manner as other the lands and chattles of the said bankrupts.

2. By the statute 13 Eliz. cap. 7. it is expressly provided, that the copyhold land, as well as the freehold land, of a bankrupt, shall be sold for the satisfying of the creditor. Co. Comp. Cop. 61. S. 52.

Gillb. Treat. of Ten. 169 S. P. and that copyhold lands are within

the statutes of bankrupts, because the stat. 13 Eliz. expressly mentions them, and though the other statutes do not, yet they being made for further remedy in the matter aforesaid, are not to be expounded by the former, especially since that has taken care that no prejudice shall happen to the lord.

3. 1 Jac. 1 cap. 15. S. 12. All money which shall be forfeited by this act, shall be recovered by the creditors only, or any of them that will sue for the same by action of debt, &c. in any of the King's courts of record; and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

4. If an obligation be taken in the name of another to the use of a bankrupt, the commissioners may well assign that, unless the other party hath of his own money paid and satisfied debts due by the bankrupt. In consideration of that also, creditors within 13 Eliz. are intended, for merchandizes, &c. and not creditors upon counter bonds. And the commissioners shall judge of that; for if they make an assignment to such creditors, such allegations afterwards come tarde; for the statute vests the thing assigned in the party to whom, &c. Per Cur. Noy 142. Calchman's case.

5. 21 Jac. cap. 19. S. 11. Enacts that, if at any time hereafter any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent of the true owner or proprietary, have in their possession, order and disposition, any goods or chattels whereof they shall be reputed owners, and take upon themselves the sale, alteration and disposition as owners, in every such case, such goods shall be liable to the bankrupt's debts, as if they had been the proper goods of the bankrupt.

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A. delivered diamonds to B. to sell. and then B. became bankrupt. Upon trover brought by A. against B. the assignees of the com-

missioners, it appearing upon the trial before Holt Ch. J. that the real property of them belong d to the plaintiff, the clause of 21 Jac. 1. cap. 19. S. 10, 11. being insisted upon by the defendant's counsel, and it seeming an hardship to the plaintiff, it was made a case in B. R. where it was adjudged upon argument, that the general words ought to be explained by the preamble, and that the jewels being originally the plaintiff's, and that the bankrupt having no more than a bare authority to sell them for the plaintiff's use, were not liable to the bankruptcy. a Wms's Rep. 318. cites it, Arg. as determined Mich. 1708, in case of L'Apostre v. Le Plaisirier.

A bill of sale of tenets and personal estate was made by A. to B. and C. in trust for payment of A's debts. B. at first acted in the trust, but afterwards C. took the whole into his possession, and

acted alone, and became a bankrupt. Upon a bill by A. against C. and the assignees of the bankruptcy for an account, Ld. C. Cowper doubted, by reason of the 21 Jac. 1. cap. 19. S. 10, 11. but afterwards held this case not within those clauses, in regard this assignment to B. and C. was with an honest intent, viz. for the payment of the debts of the assignor, and therefore decreed the assignees under the commission against C. to account for all the estate of A. and that the same should not be liable to C's bankruptcy. Wms's Rep. 314. 391. Trin. 1716. Copeman v. Gallant.

It was argued, that if a factor becomes a bankrupt, the goods bought by him as factor shall not be subject to his debts. Ld. Chancellor asked if there is any case of that? and said, that if a factor continues a long possession, by which they are taken as his own, and credit given to him on that account, it would alter the case; for if possession and disposition be given to a person that becomes a bankrupt, though no intent of fraud appear, yet if it gives a false credit, there is the same inconvenience as if fraud was intended; for if the bankrupt appear the visible owner so as to gain a false credit, there is the same inconvenience, and it matters not whether it was by fraud, or only by neglect, or out of a humour. MS. Rep. Trin. 1716. in Canc. Copeman v. Gallant.

6. S. 12. The commissioners shall have power by deed indented and enrolled within six months after the making, in some of his Majesty's courts of record at Westminster, to bargain, sell and convey any manors, or hereditaments, whereof any bankrupt shall be seised of any estate in tail, in possession, reversion or remainder, and whereof no reversion or remainder shall be in the King of the gift or provision of his Majesty, his progenitors, or successors, for the benefit of the creditors, and all such bargains, sales and conveyances shall be good against all persons whom the bankrupt by common recovery, or other means, might debar from any remainder, reversion, rent, title, or possibility, of the said manors or hereditaments.

Jo. 202. pl.
3. S. C.
agreed una-
voce against
the plaintiff.

7. Two merchants became bound in a statute 21 Jac. 1. for a true debt, which being forfeited, the cognisee sued forth an extent 30 October, 3 Car. and extended the goods 31 October following, and the 3 November the cognisors became bankrupts, and upon the 6 November the defendant brought a liberate upon the extent, and the goods were delivered to him according to the appraisement; 8 November a commission of bankruptcy was awarded against the cognisors, and the 23 November the commissioners sold the goods to the plaintiff, who brought trover against the cognisee, and the question was, if this sale was good? It was per tot. Cur. resolved, that as the goods were extended before the cognisors became bankrupt, though delivered by the liberate afterwards, they could not be sold by the commissioners, because after the extent they were in custodia legis, so as the cognisors had no power to give, sell, or dispose of them; besides, the extent was returned before they became bankrupts, and the goods were delivered to the cognisee are the liberate, before the commission sued out, and when the liberate is brought, it shall have relation to the extent, and they be quasi but one extent. Cro. C. 148. Hill. 4 Car. 1. B. R. Audley v. Halfey.

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Jo. 215. pl.
4. S. C. held
according-
ly.—S. C.
cited by
Ventris.
2 Vent. 95.
—If the
sheriff takes
the goods
of a bank-

8. Upon a fieri facias money was levied by the sheriff on an execution for damages and costs in an action on the case for words, and before the return of the writ, the plaintiff, at whose suit the execution was taken out, became a bankrupt, and his creditors having sued out a commission of bankruptcy, the commissioners assigned this money in the sheriff's hand to them; adjudged, that the assignment was void, because it was made after the execution executed, and that was before the party became a bankrupt, and it

it cannot be said to be the bankrupt's money, till it is paid to him, so that the money was in custodia legis, and no body could give a legal discharge for it, but he who was a party to the record. Cro. C. 166, 176. pl. 24. Mich. 5 Car. B. R. Benfon v. Flower.

rupt in execution, though it be before the commission taken out, yet it seems that the

commissioners may sell them, if it be executed after the party became a bankrupt. Freeman. Rep. 397. pl. 516. b. Trin. 1675. Anon.

9. If a gentleman buys and sells lands, he is not within the statute; for it ought to be taken of those who buy and sell personal things; per Crooke J. Mar. 35, 36. pl. 67. Trin. 15 Car.

10. A bailiff took goods in execution by virtue of a *fi. fa.* which bore teste 4 Junii, but not taken out before 11 Junii following, and between those two days (viz.) 6 Junii, the owner of the goods became a bankrupt, and in an action of trover brought by the assignee of the commissioners of bankruptcy against the bailiff, in whose possession the goods were, it was the opinion of the court, that they were liable to the judgment from the time of the teste of the *fi. facias*, for that is properly the emanatio brevis, though in fact it be at another time. Sid. 271. Trin. 17 Car. 2. B. R. Bailly v. Bunning.

Lev. 173. S. C. adjudged for the officer, and Windham and Twifden held, that the goods are bound by the act of bankruptcy, and subject to

the disposal of the commissioners.——Keb. 930. pl. 36. S. C. it was agreed by the court and counsel, that such execution of the writ was not sufficient to hinder a division amongst the creditors.——Keb. 34. pl. 66. S. C. the court agreed a right in the creditors by the act of bankruptcy, and that thereby the goods are bound, though the creditors have no action till assignment.

11. On motion for money out of court brought in by the sheriff on a vend. expnas teste before, but after commission of bankrupts taken out, the court said, that unless the goods were seized before the party became a bankrupt, though they were seized before the teste of the commission, yet the goods are bound by the bankruptcy. 3 Keb. 480. Trin. 27. Car. 2. B. R. Bingley v. Warcop.

12. In a special verdict in assumpsit brought by an assignee of the commissioners of bankrupts, the case was, T. obtained a judgment against W. for 400l. and on the 19 June brought a *fi. fa.* which was delivered to the sheriff 30 June in the morning, and at night W. left his house, and became a bankrupt. On the 1st of October following, the sheriff levied of the goods of W. to the value of 400l. and paid the same to T. and afterwards the commissioners assigned this money to the plaintiff, who brought this action against T. It was held by all the justices, that the assignment by the commissioners was good; for the new statute makes no difference in this case; because before that statute was made, the goods were bound from the teste of the writ, but now they are bound from the delivery of them to the sheriff; that is, they are bound that the bankrupt himself cannot dispose them, but the commissioners may, by the express words of the statute 23 Jac. 1. c. 19. no execution thereof having been served and executed. But then all the judges (except Levinz, who at last assented) held clearly, that the com-

missioners

missioners could not assign the money, for their power is only over the bankrupt's goods, but *the money for which they were sold was never the * bankrupt's money*, and so no action would lie for it. 3 Lev. 69, 191. Mich. 36 Car. 2. C. B. Phillips v. Thompson.

Comb. 121.

Trin. 1 W.

& M. in

B. R. the

S. C. and

judgment

accordingly

for the defendant.

—Show. 146.

Letchmore v. Toplady,

S. C. adjdged

for the defendant.

—3 Vent. 169, 170.

S. C. the court

was of the same

opinion, but upon

importunity

leave was given

to speak further

to the case the next term.

13. When a judgment is once *executed*, the goods are in custodia legis, and shall not be taken away by an exchequer process, or assignment of commissioners of bankrupts. 3 Mod. 236. Trin. 4 Jac. 2. in B. R. Letchmere v. Thorowgood, & al'.

14. A. puts out 1000l. at interest to the East India Company, and takes bond for it in the name of J. S. his wife's relation, and afterwards A. is bankrupt; J. S. is summoned before the commissioners, but before his examination, tells the Company that the money was not his, but that they should pay it to the person as should bring the bond. Accordingly A's wife brought the bond, and received the money. The court will not enforce J. S. to pay the money. Ch. Prec. 18. pl. 17. Hill. 1690. Hill. v. Moor.

15. Two foreigners beyond sea *consign goods to B.* then in good circumstances in London, but before the goods arrive B. becomes a bankrupt; if they can by any means *prevent the coming of the goods to B.* or the assignees, they may; and B. or the assignees shall have no relief in equity. 2 Vern. 203. pl. 187. Hill. 1690. Wiseman v. Vandeputt.

16. *Till an assignment*, the property of the goods is not transferred out of the bankrupt. 1 Salk. 108. Pasch. 1 W. & M. in B. R. Cary v. Crisp.

17. *The father on his son's marriage settles lands on himself for life, remainder to his son for life, &c. and covenants during his own life, to pay the son 15l. a year. The son becomes a bankrupt;* the plaintiff as assignee, brings a bill against the father, to have the benefit of this agreement, and to compel the payment of the annuity. But per Cur. an assignee under a statute is not intitled to have the performance of an agreement made with the bankrupt. 2 Vern. 194, pl. 176. Mich. 1690. Moyfes v. Little.

18. If a bankrupt be *outlawed* after he has committed an act of bankruptcy, and upon the outlawry the K. *leases the profits of his lands, and grants his chattles*, and after a commission of bankrupts is taken out, this will not defeat the interest which the creditors have by the bankruptcy in his estate. 1 Salk. 108. pl. 2. Hill. 2 W. & M. in C. B. Pain & al' v. Teap, & al'.

Ibid. 290 at the end adds a quere, if the decree on a rehearing was not reversed,

19. An *award* is made in an adversary suit between A. and B. partners in iron mills; on a reference by consent, and after exceptions taken thereto, it was confirmed by the court. A. was then a bankrupt but not known to be so, a commission is afterwards taken out; assignee brought a bill against B. for an account of A's estate; but per Cur. there appearing no fraud in obtaining the award,

award, but it being in an adversary suit, and the award after excepted to, &c. though A. might be then a bankrupt, yet not being known to be so at the time of the award, such award ought to stand. 2 Vern. R. 229. Pasch. 1691. Whitacre v. Pawlin.

20. A man had devised lands, which were in mortgage, to be sold, and the surplus of the money to be paid to his daughter; the daughter married a man, who soon after became a bankrupt, and the commissioners assigned this interest of the wife's; the husband died, and the assignees brought this bill against the wife and trustees, to have the land sold, and the surplus of the money paid to them; but the court would not assist in stripping the wife (who was wholly unprovided for) of this interest, but dismissed the bill at the Rolls. Abr. Equ. Cafes. 54. Mich. 1698. Parker v. Dykes.

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21. It was ruled by Holt Ch. J. upon Tuesday January 31. Hill. 10 W. 3. at Nisi Prius at Guildhall, upon evidence in a trial, 1st. That if the goods of A. be seized upon a fieri facias on a judgment against A. and after the seizure A. becomes a bankrupt; this act of bankruptcy cannot affect the goods levied in execution as aforesaid. But if A. was a bankrupt before the seizure, and after the bankruptcy, the sheriff upon a writ of fieri facias to him directed upon a judgment obtained against A. seizes the goods and sells them, and a commission of bankruptcy is granted, and the said goods assigned by the commissioners, the assignee of the commissioners may maintain trover against the vendee of the goods; but no action will lie against the sheriff, because he obeyed the writ. Ld. Raym. Rep. 725. Cole v. Davis.

22. It was resolved in this case, that if goods of A. are seized upon a fieri facias, and sold to B. bona fide upon valuable consideration; though B. permits A. to have the goods in his possession, upon condition that A. shall pay to B. the money, as he shall raise it by the sale of the goods, this will not make the execution fraudulent. And in such case a subsequent act of bankruptcy by A. will not defeat the sale. But though the original debt was just, yet, if the execution was fraudulent, viz. upon any trust, a subsequent act of bankruptcy will defeat it. Ruled by Holt Ch. J. Ld. Raym. Rep. 725. Cole v. Davies, & al' assignees of Maul a bankrupt.

23. A legacy was given to A. before he became a bankrupt, for which he had a decree. Assignee shall have the benefit of the decree. 2 Vern. R. 432. Hill. 1701. Toulson v. Groul.

A legacy was left to a feme covert, and afterwards her husband

became bankrupt; the commissioners assigned over the legacy, and then the bankrupt died. Decreed that the wife surviving should have the legacy; Arg. Ch. Prec. 121. Trin. 1700. in case of Burnet v. Kinsiston.

24. In a special verdict in ejectment the case was, the custom of a manor was, that a copyholder might surrender for three lives successive, and that an heriot was due on the death of every tenant. A copyholder surrendered to W. R. for his own life, and for the lives of A. B. and C. D. and the question was, whether this was warranted by the custom? and adjudged that it was, for there could be no occupancy; but Powell Justice doubted, because of the statute

6 Mod. 68. S. P. in S. C. by Holt Ch. J. that if the assignee dies during the life of copyholder-bankrupt

there will be a case out of the custom by the transmutation of the grant by the act of parliament, and yet the lord

shall have his heriot, for it never was the intent of the statute, to put the assignee in a better condition than his principal, whose estate he has, would have been in, nor to work an alteration of tenement to the prejudice of the lord; this is supposing the copyholder surviving should not have it back again, and if he shall have it again upon the death of the assignee, during his life, then the lord by original custom ought to have a heriot, and a subsequent act of bankruptcy shall not defeat him of it; and if the copyholder had died, living the assignee, and thereby his interest determined, as some thought it would, quære, who shall pay the heriot? But upon this point they seemed cautious of delivering any opinion, but reserved themselves till that matter would come to be a question; for they said it was worth consideration.

[93] 25. If there be several *joint-traders*, payment to one of them is payment to all. So if they all, except him to whom the payment was made, are bankrupts, the payment is only unavoidable as to his proportion. At Nisi Prius coram Holt. 12 Mod. 447. Pasch. 13 W. 3. Anon.

See (Y) 26. And if there be four partners, whereof three are bankrupts, and their shares assigned, and a payment was made to him that was no bankrupt, it is a payment to all the assignees, for now they are all partners. Ibid.

27. Though a surrender of a *copyhold* be void in law for want of a *presentment*, and that might be the laches of the mortgagee in not procuring it, yet the surrender was a lien and bound the land in equity; and the surrenderor, or if he become bankrupt, the assignee, who ought not to be in better case than the bankrupt, is plainly bound in equity by this defective conveyance. (Et come moy fembles, says the reporter; he became a trustee for the purchaser.) 2 Salk. 449. pl. 2. Mich. 5 Ann. in Canc. Taylor v. Wheeler.

bill.——S. C. cited by Mr. Vernon. Wms's Rep. 280.——S. C. cited by Mr. Vernon. Chan. Prec. 524.——S. C. cited 10 Mod. 492. 494. 495.

28. Commissioners of bankrupt of one S. assign a bond of 80l. which was made to one W. who was former husband to the wife of S. and to whom she was executrix, and held per Cur. that they could not assign any thing but what the bankrupt had in his own right. The power the husband had of disposing of it, does not make it his till he has disposed of it. Per Holt Ch. J. and Powell J. sed adjournatur. 11 Mod. 138. pl. 5. Hill. 6 Ann. Reg. B. R. Ludloe v. Browning.

Gilb. Equ. Rep. 35. 29. A. was assignee of a commission of bankruptcy issued out against one Bosvil, who had contracted with the defendant for goods to the value of 244l. but not having ready money to pay for them, offered to mortgage to him an estate he had in possession, as a security for the money; and for that purpose left with defendant the title deeds to get the assignment drawn; defendant carried the deeds

deeds to an attorney to draw the assignment, who died without doing it; after that, he carried them to a scrivener; but before the assignment was perfected, Bosvil became a bankrupt. A. now brought his bill to have the deeds delivered up for the selling of the estate to satisfy the creditors. Defendant's council urged, that this was more than a pledge of the deeds, for that an assignment was intended to be made; that if it had been made, the court would not have taken it from him without payment of the money; that it's not being made, was owing to the death of the attorney, which was an *accident*, and this court often relieves accidents; and therefore the deeds ought not to be delivered up without payment of the money. The court decreed the deeds to be brought before the master, and to be delivered by schedule to the plaintiff. But, note, no reason was given for this decree. Ch. Prec. 375. Mich. 1713. Brander v. Boles.

fed hoc durum habebatur.

30. *Feme before marriage vests her estate in trustees for her separate maintenance*; her debts will not be discharged by the bankruptcy, nor her estate out of the reach of the creditors; but such settlement or conveyance quoad the creditors shall be deemed void and fraudulent; per Parker Ch. J. in delivering the opinion of the court. 10 Mod. 247. Trin. 13 Ann. B. R. Miles v. Williams.

S. P. by Ld. Ch. J. Parker. Trin. 1714. Wms's Rep. 258. in case of Miles v. Williams.

31. *M. a feme sole entred into a bond, and married A. who after became bankrupt*. It was resolved by the court of B. R. that by the bankruptcy of the husband, the bond-debt of the wife is discharged, and also that *debts due to the wife, though unrecovered*, are within the act of 4 Annæ, cap. 17. to be assigned by the commissioners of the bankruptcy. Wms's Rep. 249. Trin. 1714. B. R. Miles v. Williams.

10 Mod. 160. 243. S. C. resolved accordingly.

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32. *A feme sole legatee of 1000l. payable after the death of the testator's wife, and at her age of twenty years, if she should live so long*, at about eighteen years of age married J. S. who after became a bankrupt. Then the widow died, and the legatee became of twenty years of age. The assignees of the bankrupt's estate brought a bill, claiming the 1000l. which was decreed by Baron Price in the absence of Ld. C. Cowper. But upon an appeal to Ld. Chancellor, his lordship declared, that the assignees were in no better condition than the bankrupt himself, and that, had he sued for the legacy, the court would oblige him to make a *provision for the wife and children*, and that so must the assignees, if they come here for equity. Wms's Rep. 382. Mich. 1717. Jacobson v. Williams.

Gilb. Eq. Rep. 140. S. C.

33. *But as to the interest of the 1000l. that having been commonly allowed to be received by the bankrupt, so ought the assignees to receive the same during his life*. Ibid. 383.

34. *And if the bankrupt's wife should die without issue*, then the bankrupt would have been allowed to receive the whole money, and therefore in such case the assignees should be allowed to receive it also. Ibid. 384.

35. *Feme sole takes a mortgage for 800l. and marries B. a tradesman, who becomes bankrupt*. The commissioners assign all his

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his estate real and personal. *B. dies.* The wife claimed the benefit of the mortgage, and brought her bill for that purpose, and to have the writings from the assignees. The Master of the Rolls delivered his opinion solemnly, first for the wife, and afterwards for the assignees; but said, that if there had been any *articles before the marriage, purporting that this money should continue in the wife as her provision*, or should be assigned in trust for her, this would have been a *specifick lien* upon the mortgage, and have preserved it from the bankruptcy. Wms's Rep. 458. Trin. 1718. *Bosvil v. Brander.*

36. *And his honour held, that if the assignees had in this case brought their bill against the widow, equity would hardly have lent any assistance against her; because they claiming under the husband, could be in no better plight than the husband would have been, and had he sued for the money, or prayed a foreclosure, equity would (probably) not have compelled the payment to him, without his making some provision for his wife, or at least upon her application the court might have prevented payment to him, unless he make some provision for her.* Wms's Rep. 459. Trin. 1718. *Bosvil v. Brander.*

37. *A. living in a remote part of England from B. and having dealings with him, sends him a quantity of goods; B. apprehensive he should soon be a bankrupt, and not thinking it reasonable, that these goods should go to the payment of other creditors, delivers a quantity of goods, which were mostly the very same that were sent him, to C. for the use of A. After that, but before A's acceptance of them, B. breaks.* The question was, whether the delivery of these goods to C. for the use of A. did not vest the property of them in A. so absolutely, as to put them out of the disposal of the commissioners of bankruptcy; and upon this appearing by evidence, at the trial, to be the case, it was stated by the direction of Parker Ch. J. who tried the cause, for the opinion of the court, who all delivered their opinion seriatim this term, that the property of the goods was so vested in A. by the delivery of the goods to C. for his use, that they were not subject to the disposal of the commissioners. 10 Mod. 432. Pasch. 5 Geo. 1. B. R. *Atkins v. Berwick.*

[95] 38. A trader in London having money of J. S. (who resided in Holland) in his hands *bought S. S. stock as factor for J. S. and took the stock in his own name, but entered it in his account book as bought for J. S.* after which the trader became bankrupt. Determined by the Lord Parker, that the trust stock was not liable to the bankruptcy, and said, it would lessen the credit of the nation to make such a construction. 3 Wms's Rep. 187 in a note of the reporter cites Trin. 1721. *Ex parte Chion.*

39. *Assignee is in the same condition (as to the right) with the bankrupt himself, and consequently if he was barred by the statute of limitations, so shall the assignee.* 8 Mod. 171. Trin. 9. Geo. *Grey v. Bendish.*

Ibid. cites the case of Mason v. Plunket. — one joint trader be-

comes a bankrupt, and the other receives 100l. of a joint debt. Assignee brought trover for the whole

whole money received; but resolved he could only maintain action for a moiety, for he can only have such action as the bankrupt could. 2 Show. 103. Pasch. 32. Car. 2. B. R. Rushward v. Hodson.

40. In an action for trover for certain S. S. bonds, this question fell out upon the trial, whether if a *bankrupt's wife employs another to buy bonds with the bankrupt's money, and he accordingly does so, and delivers them to the wife*, the assignees under the commission may come upon the buyer? Upon which question, the Ld. Ch. J. whom the cause was tried before, ordered the postea to be stayed. And now the court seemed to be of opinion, that the commissioners could not come upon the buyer; for they said, if they could, it would be of dangerous consequence; because he only acts as an agent or servant to the other. *However it stood over.* Barnard. Rep. 77. Trin. 2 Geo. 2. Wilson v. Polton.

41. An estate was devised to be sold, and the monies arising by such sale to be divided among such of the children of A. as should be living at A's death. B. one of A's children became bankrupt, and the commissioners assigned over his estate; after which B. got his certificate allowed, and then A. died. Decreed that this share of the money which on A's death belonged to B. should be paid to the commissioners; because not only the later statutes, relating to bankrupts, mention the word (possibility) but also because 13 Eliz. cap. 7. S. 2. impowers the commissioners to assign all which the bankrupt might depart with; and here B. in the life-time of A. might have released this contingent interest. Besides the 21 Jac. 1. cap. 19. enacts that the statutes relating to bankrupts shall be construed in the most beneficial manner for creditors. Wms's Rep. 385. in a note there, cites it as decreed at the Rolls. Mich. 1731. and affirmed by Ld. Ch. King, Mich. 1732. Higden v. Williamson.

S. C. cited 3 Wms's Rep. 132. and in a note, 137. the Reporter cites the stat. 5 Geo. 2. cap. 10. the words of which are, All such effects of which the party was possessed or interested in, or where-in he has, or may ex-

pect any profit, possibility of profit, benefit, or advantage whatsoever.

42. 5 Geo. 2. cap. 30. S. 9. *In case any commission of bankruptcy shall issue against any person, who after the 24th of June, 1732, shall have been discharged by virtue of the act, or shall have compounded with his creditors, or delivered to them his effects, and been released by them, or been discharged by any act for relief of insolvent debtors, then the body only of such person conforming shall be free from arrest and imprisonment; but the future estate of such person shall remain liable to his creditors (the tools of trade, necessary household goods, and necessary wearing-apparel of such bankrupt and his wife and children excepted) unless the estate of such person shall produce clear 15s. in the pound.*

43. J. S. by will gives to his daughter A. then wife of one Beavis, his gold watch, jewels, china, and household goods to be at her disposal, and to do therewith as she shall think fit. Testator dies. Beavis becomes a bankrupt.

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This is a devise to the separate use of the wife and not assignable by the commissioners of the bankrupt, &c.

A case was cited as before Ld. Chancellor Cowper, viz. *devise to some covert for her use and benefit*, and held that because it was not

not for her separate use, but only for her use and benefit, it was the husband's; but the Master of the Rolls said he was very much dissatisfied with that determination, and here the intent appears to give it to the separate use of the wife; and a married woman could not have, &c. to her own dispose, if in the power of the husband, and the things were proper for her separate use, and decreed for the wife. MS. Rep. 1733. at the Rolls. Kirk v. Paulin.

44. If J. sends goods to B. from beyond sea to the use of B. and before these goods are paid for, B. dies insolvent, I cannot have my goods again; but if I send goods to a factor to dispose of to my use, and he becomes a bankrupt, these goods are not liable to the debt of such bankrupt. 3 Wms's Rep. 185. Trin. 1733. Godfrey v. Furzo.

45. Stat. 19. Geo. 2. No person who is or shall be bona fide a creditor of any bankrupt, for or in respect of goods really and bona fide sold to such bankrupt, or for, or in respect of any bill, or bills of exchange really and bona fide drawn, negotiated, or accepted by such bankrupt, in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate, any money which before the suing forth of such commission was really and bona fide, and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice, that he is become a bankrupt, or that he is in insolvent circumstances.

(U) Liable. What. Settlements or Securities on, or Claims by Wife or Children.

Jo. 451. pl. 4. Palmer v. Blake, S. C. accordingly. S. C. cited per Cur. 2 Vern. 194. 195. Mich. 1690. S. C. cited 4 Mod. 252. 253. Gilb. Treat. of Ten. 294. cites S. C. & S. P. for after sale of the lands by deed indented and inrolled, if the husband dies, he does not die seised.

[97] Cro. C. 348. pl. 3. S. C.

1. IN trespass, upon not guilty pleaded, it was found, that the land was copyhold of inheritance, held of the manor of C. and that there was a custom in that manor, that if a copyholder in fee died seised, living his wife, she should have the copyhold during her life, and twelve years after; then they found the statute 13 Eliz. and 1 Jac. 1. of bankrupts, and that upon a commission of bankruptcy, the husband was adjudged a bankrupt, and that he being seised in fee of the said copyhold, the commissioners made a bargain and sale thereof to the plaintiff for the use of the creditors, &c. They find, that the widow, at the court held, &c. was admitted tenant secundum consuetudinem manerii before the plaintiff was admitted; it was held by Berkley and Croke justices, that the bargain and sale binds the copyholder, and bars his estate, and that he is no longer a copyholder after the bargain and sale inrolled; and that when the bargainee is admitted by the lord, the estate shall vest in the bargainee, and the admittance shall have relation to the bargain and sale and divest the estate, which the feme claimed by the custom; and judgment accordingly. Cro. C. 568. Hill. 15 Car. B. R. Parker v. Bleek.

2. A. purchased a copyhold to him and his son for their lives, remainder to his wife in fee, and about two years after turned inn-keeper,

keeper, and about twelve years afterwards became a bankrupt, and his copyhold was sold by the commissioners to the defendant; A. the bankrupt died. [The wife died.] B. his son entered and made a lease, &c. to the plaintiff, who brought ejectment; it was resolved, that though a copyhold estate is liable to the statutes, yet this copyhold is not, because it was bought two years before the purchaser was an innkeeper; so that he was not an offender when he bought the estate, and judgment was given for the plaintiff. March 34. pl. 67. Trin. 15 Car. B. R. Crisp v. Prat.

but states it, that the lessor of the plaintiff was the person to whom the commissioners sold the land for the benefit of the creditors, and ad-

judged for the defendant [the son,] by all the justices, but Berkley contra; for they held, that the purchase being before A. the father became a trader, and so long before he became a debtor, is not within the statute; for the statute intends such persons only as get their living by buying and selling, and by fraud had passed away their lands to friends in trust, and became indebted, and committed such acts of a bankrupt; that for such acts done by them after, it should be within the commissioners power to sell such their lands. But here, many years before, when he was a clear man, he procured this land to be settled upon his son. (No fraud or purpose of being a bankrupt being found.) It would therefore be a mischievous case, and full of inconveniences, if it should be within the statute; for none might know with whom to deal by way of marriage or otherwise, when he is not a tradesman, and settles land upon his wife and children bona fide, and without cause of being suspected to be a bankrupt, and afterwards becomes a tradesman, and then a bankrupt, if this act should overthrow a conveyance duly settled.——Jo. 437. pl. 3. S. C. states it, that the ejectment was brought by the son, and that judgment was given by all for the plaintiff, praeter Berkely, who held for the defendant in omnibus.

But it was resolved, that copyhold lands otherwise were within the statutes, and might be sold. Cro. C. &c. ibid.——Supp. to Co. Comp. Cop. 88. cites S. C.——S. C. cited Hardr. 435. 436, and says, that the reason why copyhold lands were adjudged in that case to be included in the general words of all lands, tenements, and hereditaments in the statute 21 Jac. touching bankrupts was, because copyholds are expressly mentioned in the statute 13 Eliz. concerning bankrupts, and the statute 21 Jac. being subsequent and explanatory, and a very beneficial law, therefore copyholds have been adjudged to be within those subsequent laws; besides, the lord of the manor, in the case of a bankrupt copyholder, can be at no prejudice, because the assignee of the commissioners is to be admitted, and to pay his fine to him.

3. A tradesman in consideration of marriage made a conveyance of his lands to himself and his wife, and afterwards became a bankrupt; it was held per Cur. that the wife was within the statute 1 Jac. 1. and the providing for his wife and children to be a providing for himself. Sty. 288. Trin. 1651. B. R. Tucker v. Cuth.

4. It is a common case, that if a man voluntarily pays money to a bankrupt after he becomes so, it is in his own wrong and he may be forced to pay it again. But otherwise it is, if the bankrupt recover it against him by course of law; per Ld. Chancellor. Vern. 94. Mich. 1682. in the case of Noel v. Robinson.

5. Devise of 800l. to be invested in land for the benefit of the wife of J. S. for her life, and afterwards to her children, and the interest of the money to go in the mean time to such person as would be intitled to receive the profits. J. S. the husband becomes bankrupt; per Cur. this not being a trust created by the husband, nor any thing carved out of his estate, but given by a relation of the wife's, and intended for her maintenance, it is not liable to the creditors of the husband, and decreed the interest to be paid to the trustee to be laid out in land and settled according to the will. 2 Vern. 96. Pasch. 1689. Vandenanker v. Desbrough.

6. A. a trader on marriage gives bond to a trustee to leave his wife worth 500l. or a third part of his personal estate, at her election. It was said, that Ld. C. Maccles-

field doubted of this.
2 Wms's Rep. 298.
cites it as Mill. Vac. 1780. on a petition ex parte Bailly.

election. A. becomes bankrupt; decreed that the wife come in as a creditor on the 500l. bond, and what should be paid in respect thereof to be put out at interest and received by the creditors during the life of the * husband, and if the wife survived, then the money to be paid to her. 2 Vern. 662. Trin. 1710. Holland v. Calliford.

—But where a bond was given by the husband for payment of a sum of money to his wife, in case she survived him, and the husband after became a bankrupt, Ld. Ch. King held, that no part of the estate should be deferred from being distributed, the act ordering a distribution within months; especially here being neither debitum in present, and perhaps might never be debitum in futuro; for she might die in her husband's life; besides, after certificate allowed, he might trade again and become solvent, and able to pay the bond. But though the debt was contingent when the obligor became bankrupt, yet if the contingency happened before the distribution made, then such contingent creditor should come in for his debt. 2 Wms's Rep. 497. Mich. 1728. Ex parte Calwell, Ex parte Cazalet, Ex parte Bateman.

So if such contingency happened before the second dividend made, the creditor should come in for his proportion thereof, though after the first dividend. By Ld. C. King. Ibid. 499.

7. *Lands devised to his daughter being a feme covert for her separate use, without appointing any trustees, and it being expressly declared to be exclusive of the husband, shall not be subject to the bankruptcy of the husband, and decreed at the Rolls accordingly.* 2 Wms's Rep. 316 to 319. Mich. 1725. Bennet v. Davis.

8. *One not in debt, nor then a trader, makes a voluntary settlement on a child, and afterwards becomes a trader and a bankrupt; this settlement is not liable to the bankruptcy.* 3 Wms's Rep. 298. pl. 75. Trin. 1734. Lilly v. Osborn.

(W) How far any Mortgagees or Purchasers of Lands or Goods from a Bankrupt shall be affected by the Bankruptcy.

1. 21 Jac. 1. cap. 19. **I**f any bankrupt shall convey, or assure any lands, goods, or estate, unto any persons, upon condition, or power of redemption at a day to come, by payment of money, or otherwise, it shall be lawful for the commissioners, before the time of the performance of such condition to appoint, under their hands and seals, persons to make tender of the money, or other performance, according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners shall, after such tender or performance, have power to sell such lands, goods, and estates for the benefit of the creditors, as fully as they may sell any the estate of the bankrupt.

2. S. 14. *No purchaser, for a valuable consideration, shall be impeached by any of the acts against bankrupts, unless the commission be sued out within five years after the person became a bankrupt.*

3. If the copyhold lands of a bankrupt be sold according to the statute of the 13 Eliz. cap. 7. the vendee shall be admitted and pay a fine. Co. Comp. Cop. 62. S. 56.

4. The

4. The *plaintiffs and the defendant were all creditors of one S.* who was a lead merchant, and who on 19 Jan. 18. Car. 2. was declared a bankrupt; and the *commissioners assigned his estate to the plaintiff* and others in the month of October, Anno 19 Car. 2. The *defendant was then in possession of his estate*, and refusing to deliver it to the *assignees*, *they brought their *ejectment*. Now, though the deed under which the defendant held the lands was dated in February after S. was declared a bankrupt, yet the plaintiffs were nonsuited. Then they brought a bill to discover whether the defendant did not know at the time of executing his deed, that S. had committed an act of bankruptcy, and so to set forth the fraud of obtaining the deed, and to have a new trial. The defendant pleaded his deed, and that S. was really indebted to him at the time it was executed, and demanded judgment, whether he should discover any thing to weaken his title? and upon long debate, the plea was allowed. *Nell. Chan. Rep. 141, 142. 22 Car. 2. Gladwin & al' v. Savill.*

3 Chan. Rep. 41. S. C. says, the defendants demanded judgment, whether they shall discover any thing to weaken their estates, or whether the plaintiffs shall examine against them as purchasers, and that upon long debate it was allowed, that the plain-

tiffs may at any time bring any new action.

5. The *assignee of a bankrupt exhibits his bill* against the defendant, *to discover goods* of the bankrupt, that came to his hands after the bankruptcy. The defendant, by way of *plea*, sets forth, *that he had no goods* of the bankrupt's, or that ever were his, *but what he bought for full and valuable consideration, and bona fide*; and that at the time of the sale and payment of his money, he had no notice either of the commission, or of any act of bankruptcy committed by the bankrupt. On long debate, the plea was allowed by the Ld. North, and to take what remedy they could before the commissioners, or at law. Hutchins, counsel for the defendant, cited a former precedent, but was not produced. 2 Chan. Cases 135. Hill. 34 and 35 Car. 2. Brown v. Williams.

6. Assignee of the commissioners of bankruptcy against P. exhibited his *bill* against the defendant, *to discover goods, &c.* which were the bankrupt's at the time of his breaking; the defendant *pleaded, that he was purchaser for full and valuable consideration, and at the time of his purchase, until the now bill, had no notice* that P. was a bankrupt, nor of any commission, and pleads this matter against any discovery. After long debate, Ld. K. North seemed to incline that the defendant, being a purchaser without notice, should not be prejudiced by this court; but that if the sale were at an extreme under-value, as for 5s. or the like, then such a general plea shall not stand. And after long debate, whether the defendant should set forth what the goods were, or what the defendant paid for them, it was concluded that he should, so as the plaintiff should consent to take no advantage of the discovery, but here in this court only, and not at law, which the plaintiff consented to by his counsel, and to subscribe his consent with the register, and then the defendant was to answer. 2 Chan. Case 156, 157. Mich. 35 Car. 2. Wagstaff v. Read.

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I

7. A.



7. A. purchases of a man, who had committed an act of bankruptcy, but *without notice* thereof; afterwards a commission is taken out, and there being a term standing out in trustees, the assignee brings a bill against them and the purchaser, to have the term assigned to him. *Bill dismissed.* 2 Vern. 599. pl. 537. Mich. 1707. Wilker v. Bodington.

[100] (X) Distribution. To Whom; and How; and When.

1. UPON view of the statute of 17 Eliz. and 1 Jac. it was resolved by the court, that if certain creditors sue a commission, and others within four months after or more, being creditors, come before distribution, and will join in the charge of the commission, and all that belongs to it, and tender their parts, that they shall not be refused, but have their equal parts as creditors. But if any distribution be made of any part of the estate, no creditors are to be admitted after, that came not in before. Hob. 287. pl. 375. Ruggle's Case.

Commissioners may sell and prepare for distribution presently upon the execution of the commission, but until the 4 months are past, they may not proceed to distribution; for the creditors which inhabit in the remote parts of the realm perhaps cannot have notice; and it may be carried so secretly, that if they might distribute presently, that they, which sued out the commission, should be only satisfied, when, indeed, there was no default in the others. Also it was resolved, that the offer of creditors to be joined, and before they be partakers, is not an effectual offer, without offering to be contributory to the charges; but to offer any particular sum is not necessary, because they know not what sum is disbursed, and that is to be assessed by the commissioners. And the words (for the charge of the commission) is to be extended to all charges arising in suing forth the commission, and in execution and defence thereof.

2. 21 Jac. cap. 19. S. 9. The commissioners are impowered to examine upon oath any person, for the discovery of the certainty of the several debts due to the creditors; and creditors having their debts secured by judgments, statutes, or other specialties, with or without penalty, or having made attachments in London, &c. where there is no execution or extent served or executed before the person became bankrupt, shall not be relieved for more than a ratable part of their just debts, without respect to any penalty contained in such judgment, statute, or other penalty.

One seized of lands in fee owes a debt by statute, and afterwards becomes a bankrupt, and the creditor by statute extends the lands, then a commission of bankruptcy is sued out; upon a reference by the Lord Chancellor to the Judges of C. B. they held that the clause of the statute was full and plain, that all the creditors of the bankrupt, unless where there was a mortgage, should be equally paid. Wms's Rep. 92. 93. Pasch. 1706. Sir Geo. Newland and Beckley v. —

And Trevor Ch. J. laid, a judgment or recognizance did no more bind the lands, than the test of a fi. fa. bound the goods at the time of the making of this statute; and it was said, if the fi. fa. was not served and executed, such creditor, notwithstanding his suing out his fi. fa. should come in only in proportion with the creditors even by simple contract. Wms's Rep. 93. Pasch. 1706. Sir Geo. Newland and Beckley v. —



3. Bill against the commissioners and assignees of a statute of bankruptcy to be let into the statute, paying contribution-money, and decreed accordingly, the plaintiff likewise accounting for what estate

estate of the bankrupt came to the hands of the plaintiff's father, and repaying money, which himself had recovered at law. Fin. Rep. 60. Hill. 25 Car. 2. Vanaker v. Nash, & al'.

4. Creditors excluded were let in for their shares according to a prior agreement, though an assignment and dividend had been made of the estate. Fin. R. 326. Mich. 29 Car. 2. Ebsworth and Mansell v. Kent & al'.

5. A. mortgaged lands, and afterwards becomes a bankrupt. The title of the mortgage is not to be impeached by the statute, and the mortgagee being a creditor likewise by bond, was decreed to come in, he paying his contribution-money. Fin. R. 466. [101] Mich. 32 Car. 2. Tanner v. Chapman & al'.

6. Where there are lands unsold, and the commissioners make a distribution on a supposed value thereof, without having any money to distribute, this was held by the court to be a good and regular distribution, and the words of the act are, that the commissioners shall have the ordering of the bankrupt's estate, so that there is no necessity to sell and distribute the money, but if they allot a proportion of the land to each creditor, it is well enough. 2 Vern. 158. Trin. 1690. Hitchcox v. Sedgwick.

7. Ld. Hutchins said, that fraudulent distribution may be set aside by the Ld. Chancellor, even upon a petition, and that it had been so done in the Ld. Clarendon's time. And in the principal case a new distribution was ordered, and land, sold before fraudulently, was ordered to be sold again, and other creditors not taken in before to have their proportions. 2 Vern. 156. to 162. Trin. 1690. Hitchcock v. Sedgwick.

8. If one quits his trade, and a commission of bankruptcy is afterwards sued out against him by his old creditors, yet an after creditor shall be admitted to have his share in the bankrupt's estate. Ld. Raym. Rep. 287. Hill. 9 W. 3. in case of Meggot v. Mills.

9. A. being indebted to a feme covert becomes a bankrupt, the husband pays the contribution money, and dies before distribution, and then the wife died. The executors of the wife are intitled to the dividend; for the husband paying the contribution money does not siter the property of the bond. 2 Vern. 707. Mich. 1715. Anon.

10. A. drew a bill of exchange for 100l. on B. in Holland, payable to C. which B. accepted, and afterwards A. and B. become bankrupts, and C. received 40l. of the 100l. out of B's effects. Ld. C. Macclesfield directed, that the creditors of A. come in for the 60l. residue of the 100l. and that if the 40l. paid to C. shall appear to have been paid out of B's own effects, then the creditors of A. should come in for the whole 100l. out of which they must answer the other 40l. to the creditors of B. that being to be taken by A's creditors in such case only as trustees for B's creditors. 2 Wms's Rep. 89. Hill. 1722. Ex parte Ryswicke.

11. A. gives a promissory note for 200l. payable to B. or order, B. indorses it to C. who indorses it to D. A. B. and C. become bankrupts, and D. receives 5s. in the pound on a dividend made by the assignees against A.—D. shall come in as a creditor for 150l.

Creditor and Bankrupt.

only out of B's effects, and if D. paid contribution money for more than 150l. it shall be returned. 2 Wms's Rep. 407. pl. 129. Pasch. 1727. Ex parte Lefebure.

12. Upon petition to Ld. Chancellor, the case was, *Hugh Payne and Deborah Bullock* May 1716 gave bond to *Mary Tirrel* for payment of 120l. In 1727 *Mary Tirrel* assigned a bond to *Rachel* her daughter the petitioner; *Hugh Payne* and *Deborah Bullock* both died. *Hugh Payne* died insolvent. *Deborah Bullock* left a considerable real estate, which devolved to *Hugh Payne* her grandson. *Hugh Payne* the grandson entered and sold part of the lands, and after became a bankrupt; his assignees were in possession of the lands that were *Deborah Bullock's*, unsold by *Hugh Payne* the grandson. Petitioner therefore prayed that those lands in the hands of the assignees might be liable to the bond debt of *Deborah*, preferable to the general creditors of *Hugh Payne* the grandson. It was insisted for the petitioner, that since the Stat. 3 & 4 W. & M. cap. 14. of fraudulent devises, lands in hands of devisees are made liable to bond debts, as in the hands of the heir, and here the assignees stand in the place of the bankrupt, and subject to the same equity, and the bankruptcy and assignment is no alienation bona fide within the exception and intention of the statute, and the case of the executors becoming bankrupts, having assets remaining in specie is common, and always held the creditors of testator to have a preference. But it was insisted e contra, that there is no specific lien. The assignment is an alienation, and the case of executors differs; executor is looked upon as a trustee. Ld. Chancellor said, this is a point of too much difficulty to determine in this summary way. Let the petitioner bring bill by Easter term, and stay sufficient of the estate in the mean time in the assignees hands. MS. Rep. Trin. Vac. 1733. Ex parte Watson, & ux.

13. Upon a mortgage of lands to W. for 1157l. and afterwards mortgaged the same together with other lands to H. well, as a collateral security for 500l. due by the said W. to H. by bond, and about 40 days afterwards W. was declared a bankrupt. Part of the premises were sold for 1050l. and the money paid to W. but the commissioners refusing to sell the residue, and the assignees refusing to satisfy the demand of H. or to admit him to have any share of the bankrupt's estate, he petitioned for a sale to be made of the rest of the mortgaged premises, and the money to be applied towards the discharge of the demands of W. and himself, and in case of any deficiency, then to be admitted a creditor on the said bankrupt's estate, for what should remain due after such sale and application aforesaid, and to stay any dividend in the mean time. Whereupon the Ld. Chancellor, upon hearing counsel, referred it to the commissioners to take an account of what was due to W. and H. respectively, for principal and interest on their respective mortgages, and ordered, that so much of the said mortgaged premises as remain unsold, to be sold to the best bidder, and the monies arising to be applied to the discharge of all principal and interest due to the said W. in the first place, and then of the said

said H. together with his costs of application, by petition to this court, to be settled by the said commissioners; and in case the petitioner and assignees should differ about the same, and if the same should not prove sufficient to pay the petitioner his principal and interest and costs as aforesaid, then the petitioner to be admitted a creditor for such deficiency, and be admitted to a dividend, &c. for the same; and that the said W. and H. be examined touching the account, and to produce upon oath all deeds, books of account, and vouchers, &c. MS. Rep. 31 May 1737, upon the petition of Wm. Howel, of Exeter, Esq.

(Y) Distribution to whom; and how. In Case of Partnership. See (T) pl. 25, 26.

1. **JOINT** debts are to be paid out of the joint stock first, and if there be an *overplus*, then that ought to be applied to pay particular debts of each partner; but if there be not enough to pay all the joint debts, and if either of the partners shall pay more than a moiety of the joint debts, then such partner is to come in before the commissioners of the bankrupts, and be admitted as a creditor for what he shall so pay over and above his moiety. 2 Chan. Rep. 225. 34 Car. 2. E. of Craven & al' v. Knight & al'.

On a joint commission of bankruptcy against two traders, separate creditors are allowed to come in, for the joint effects are to be ap-

plied, first to pay the partnership debts, and then the separate debts; and the separate effects to pay first the separate creditors, and afterwards the partnership creditors; per Cowper Chancellor. 2 Vern. 706. Mich. 1715. Crowder's case. — Wms's Rep. 346. S. P. per Ld. Cowper. — S. P. 2 Wms's Rep. 500. by Ld. C. King, Mich. 1748. *Ex parte Cook.*

2. Two partners in trade put in each an equal stock, and agreed by covenant, that the stock should pay the debts of the stock, and neither of their separate debts should charge the stock, but only his own estate, or to that effect. They both became bankrupts, and a commission against them both; one of them owed separately more than the other. The question was between the separate creditors of each bankrupt, and the creditors on account of the joint stock; for these would exclude the separate creditors from charging the joint stock, but that it should satisfy the stock debts. But the Lord North was of a contrary opinion; for the covenant of the partners cannot bind any of their creditors, but only themselves. 2 Chan. Cases 139. Pasch. 35 Car. 2. 27. Ld. Craven v. Widdows.

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A quære is added, how the separate creditors could have other title than those under whom they claim? *ibid.*

3. R. S. and G. were partners together in the trade of a dry-salter; G. embezzles and wastes the joint-stock, contracts private debts, and becomes a bankrupt. The commissioners assign the goods in partnership. Bill by R. the plaintiff for an account, and to have the goods sold to the best advantage; and insisted that out of the produce of the goods, the debts owing by the joint-trade ought to be paid in the first place, and that out of G's share satisfaction must be made for what G. had wasted or embezzled; that the assignees could be in no better a case than the bankrupt himself,

himself, and were intitled only to what his third part would amount unto clear after debts paid and deductions for his embezzlement; and the court seemed to be of that opinion; but sent it to a master to take the account and state the case. 2 Vern. 293. pl. 283. Trin. 1693. *Richardson v. Goodwin & al'*.

4. If one or more of the joint traders becomes bankrupt, his or their proportions only are assignable by the commissioners to be held in common with the rest, who were not bankrupts; at *Nisi Prius* before Holt. 12 Mod. 446. Pasch. 13 W. 3. B. R. Anon.

5. Trover for three bank notes, which were payable to A. and Co. and upon the trial it was objected that the sole interest of these notes was not in A. alone, &c. and that A. had once a partner, one J. who died before the drawing of these notes, and so his executors having not renounced the partnership were still interested in all things relating to their trade. And J. Powell held that this was true enough, for *prima facie* the executors of J. shall be taken to continue in the partnership till they renounce it, and no renunciation being made out in this case, but some of the executors having proved the will, they were interested in these notes too, though they never acted in the trade. Per Powell J. *Somerset* assizes, 5 Ann. in *Arthur's* case.

On a joint commission, the joint creditors are first to come in on the partnership effects, and if there remains a surplus, then the separate creditors are to be admitted. 3 Wms's Rep. 25 Hilk. 1729. *Horley's* case.

6. Separate creditors allowed to come in under a joint commission against two partners; but the joint effects are to be applied, first to pay the partnership debts, and then the separate debts; and as to the separate effects, first, the separate creditors, and after the partnership creditors, are to be paid out of the same. 2 Vern. 706. Mich. 1716. *Ex parte Crowder*.

7. If a joint commission of bankruptcy issues out against two joint traders, it was questioned, if separate creditors may come in under it? And that they may, it was argued, that if there are two joint traders, and one becomes a bankrupt one day, and the other the next day, and a joint commission is taken out, different relations must be had under the joint commission with regard to the different times of the bankruptcy, and the distribution under it must be the same, as if separate commissions had been taken out. For in both cases the joint fund is primarily applied to the joint debts, and the separate fund to the separate debts, and then in an average to the joint debts & vice versa. So are the orders in the court of Chancery in the following instances, viz.

A. and B. were partners, but the partnership being dissolved, and A. setting up for himself became bankrupt, and a commission issued out against him, and then B. failed, and a commission issued against him, the joint creditors were admitted to prove their joint debts under the separate commissions, and cites 22 Jan. 1738, the case of *STEPHENS v. BROWN AND ADLAMS*. — And that 22d April 1729, it was ordered, that the joint estate should go to the joint creditors, and the remaining part of the joint

joint estate, which respectively belonged to each, should go to their *separate creditors* upon a *joint commission* sued out against the then defendants, and cited *HORSEY v. HEYHAM AND HEYHAM*, — And that 2 Geo. 2. in C. B. two being *joint obligors*, and after bankrupts, separate commissions were taken out against them, and the separate commissioners refusing to let in the obligee, he brought an action against one of the obligors, but the defendant having got a certificate under the separate commission was discharged, *MATTHEWS v. ALAND*. Which proves that joint creditors may come in under separate commissions, and by the same reason, separate creditors may come in under a joint commission, and the law being so, *every assignee may recover* by setting forth the special matter; and besides, if the *assignee of the other part will not join*, he may be summoned and levered. And the court thought the last case cited came fully to the point of the principal case, and therefore inclined to give judgment accordingly; sed adjournatur. Gibb. 282. Pasch. 4 Geo. 2. B. R. *Grace v. Heyham*.

(Z) Distribution, where Debts are due to the Crown.

1. **O**N a scire facias on an extent, the case was this. Dixon a receiver general, as principal, and George Newell and Joseph Newell (as his securities) became bound to the Queen in 23000l. Upon this bond an *extent* issues against the body, lands and goods of G. Newell and J. Newell, dated 3 December, and upon the 8 December an *inquisition* was taken upon the said extent, whereby it was found that the defendant Arnold was indebted to George Newell in 109l. 12s. Upon the return of this inquisition, a scire facias is sued out against Arnold, and he comes in and pleads, that upon the 2d of the same December G. Newell became a bankrupt, and that thereupon a commission of bankruptcy issued, and that proceedings were had thereupon according to the several statutes made concerning bankrupts, and that 6 December G. N. was found a bankrupt, and that thereupon the commissioner assigned over his estate and effects to one Taylor, so that he the defendant was not indebted to the said G. N. but to the assignees of the commission of bankruptcy. Upon this plea, the attorney general demurs, and shews for cause two things, 1st, That it was not set forth what act of bankruptcy the said G. Newell had committed; and, 2dly, That he had not set forth the commission, and that the commissioners had adjudged and declared G. N. to be a bankrupt, and that the plea amounted to the general issue. The barons delivered their opinions seriatim.

MS. Rep. Hill. 8 Ann. in the Exchequer, the Queen v. Arnold.

And Baron Lovell said, that the plea in this case was naught, 1st, Because the defendant had not set out what act of bankruptcy George Newell had committed; for this being in the case of the crown, it is not sufficient to say only, that such a day G. N. manifestly

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manifestly became a bankrupt, though this sort of pleading to bar a subject may be good enough, a plea to a common intent being good, but in case of the crown it must be certain; and adly, Because he had not set forth that the commissioners had found him a bankrupt, for the commissioners are to proceed upon the statutes, and they ought to bring the party within the extent of the acts; and of this opinion was Ward Ch. Baron.

But Baron Lovell observed, that there was another fault in the plea, because in setting out the assignment it was *not pleaded with a proferet in cur'.*

Baron Price held, that the pleading was sufficient. As to the first cause assigned, he said, that the old precedents in the case of bankrupts, did set forth all the proceedings, as the petition, the granting of the commission, &c. and what was done thereupon, but the precedents of late were otherwise, and they do not set forth any particulars, but only in general, that such a day he became a bankrupt. Lut. 104. In an assumpsit by assignees of commissioners of bankrupts, the short way is now only used, when a person is declared a bankrupt by commissioners, it is not any way material; for on an issue whether a man be a bankrupt or not, *though a particular act of bankruptcy is assigned in the plea, yet any other act of bankruptcy may be given in evidence.*

The judgment or declarations of the commissioners is no evidence in a trial, and consequently it cannot be material. But now as to the matter, whether this matter ought to be more particularly set out in the case of the crown, he did not think it necessary, for by the same reason that one act of bankruptcy ought to be set forth, all the acts of bankruptcy ought to be set forth; and the act of bankruptcy, or the declaration of the commissioners, is not anywise material, neither is it any evidence. As to the 2d exception, that this sort of pleading amounted to the general issue, and that, though this sort of pleading might be good in the declaration, yet it is not good in a plea; he said, that a declaration required more certainty than a plea. Co. Litt. 303. In a declaration every thing must be affirmed particularly. Now as to the saying that he was indebted to Taylor, and not to the crown, whether or no this amounted to the general issue; he said, that to make a general issue, they should have gone into a particularity, but here this is done not full enough. By 21 Jac. cap. 4. it is enacted, that whensoever the King, and such from under whom the King claims, &c. hath been; he shall be, out of possession for twenty years, and shall not, &c. have taken the profits of any lands, &c. within twenty years before the information or intrusion to be brought to recover the same; the defendant, &c. may plead the general issue, if he, &c. think fit, and shall not be pressed to plead specially; and where any information of intrusion may fully and aptly be brought on the King's behalf, no scire facias shall be brought whereunto the subject shall be forced to a special pleading, but the party was before obliged to set forth his title. Where a man would take advantage of a matter pleaded that amounts to the general issue, upon

upon a demurrer, he must assign it for cause. 1 Cro. 146. Ward v. Blunt. Baron Bury was of the same opinion, that the pleading was good.

The question of law in this case was, what operation this extent had, and whether or no the goods and chattles of G. Newell were not bound from the teste of the writ of extent? As to this point it was resolved per tot. Cur. that judgment should be given for the Queen.

Baron Price argued, that it is agreed of all hands, that in case of an execution for a subject, whether it be an elegit, or fieri facias, or an extent, the goods and chattles of the party were bound from the teste of the writ, before the statute of frauds and perjuries, by virtue of which statute, the property of the goods of the party against whom a writ of execution is sued out, is not bound, but from the time that such writ is delivered to the sheriff, &c. to be executed. But this statute does not extend to the case of the crown. On an extent on a statute acknowledged according to 23 H. 8. when a liberate is sued out, and the goods are delivered by the sheriff, according to the appraisement in the extent, the goods of the party are so bound hereby, that he cannot either give, sell, or dispose of them, neither can he forfeit them, nor can they be distrained for rent. The liberate here has relation to the teste of the extent, though the extendee had no right in the goods until the liberate, 1 Cro. 148. Jones 202. Audley v. Halfey. The writ to seise does not give a property, but it is only a protection from the crown to have the goods delivered over to the party, the liberate is but a finishing of the execution. There is such a lien upon the goods from the teste of the execution, that if the party die, or assign away his goods, the sheriff may execute the writ against the executor, or against the assignee, Rolls Ab. 896. The interest of the goods is bound though the property be not transferred. See Keb. 930: 932. Bailey against Bunning. Sid. 271. 1 Lev. 173.

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Now it will be hard to vary this in the case of the crown, or to make a construction to lessen the prerogative of the crown.

Of extents there be several sorts, for some are general to seise body, land and goods; some have a commission in them to find debts by inquisition, or otherwise; some are to seise into the Queen's hands until the debts are satisfied, and some of these extents are to sell the goods of the party, and others are that the goods should not be sold but by order from the court. But this is only as a check upon the officer, not but that the crown hath the property.

In case of a statute staple, according to 27 E. 3. cap. 8. the goods of the party are to be seised and delivered to the party; now this gives an immediate property. But in case of a statute merchant this is not so, for there goes first, process against the body, and then upon a return of a non est inventus, or a mortuus, there goes an extent against the lands and goods. This must be much stronger in the case of the crown.

Executions for the crown have relation to the time of the execution awarded, and the goods and chattles of the party are bound

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bound from that time into whose hands soever they come; 2 R. Ab. 157. 171. Sir George Fleetwood's case.

In Dyer 67. STRINGFELLOW'S CASE. Stringfellow sued a writ of *extendi facias*, out of the Chancery, to have execution of a statute staple against one Browneslope, and takes the goods accordingly, and seises them into the King's hands, but there is no liberate. Then there comes a prerogative writ out of the Exchequer, rehearsing the King's prerogative, that he ought to be satisfied his debt, and commanding the sheriff to levy upon Browneslope a debt of 500l. which he owed the King, and if he had not sufficient to extend his land, and this writ was delivered to the sheriff after the day of the return of the first writ, but the first writ was not returned at the day. And the sheriff hereupon returned the special matter, and it was held in the Exchequer, that the sheriff should be amerced if he would not amend his return (i. e.) return that he had saved the King's debt; for the property of the goods was not in Stringfellow, before that the goods were delivered to him by virtue of the liberate.

[107] There is a very ancient statute, 25 E. 3. 19. reciting that forasmuch as the King had made protections to diverse persons which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others, till they had made gree to the King of that which was due to him by reason of his prerogative, and so during such time no man hath used, or durst implead such debtors, whereby it is assented and accorded, that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's court by their debtors, and if judgment be thereupon given for the plaintiff, the execution of the same judgment shall be put in suspense, till gree shall be made to the King of his debt. And if the creditors will undertake for the King's debt they shall be thereto received, and shall have execution of the debtors of the debt due to them, and also shall recover against them, as much as they shall pay to the King for them.

As to the objection that this case differs from the common case of extents for the crown, for that here is a debt found which is in a third person's hands, the extent has bound the money, goods, and chattles of the party himself, but not the debt in the hands of Arnold.

Now, this debt in Arnold's hands is a chattle, though it be but a chose in action, which in the case of a subject is not assignable nor liable to any execution; but in the case of the crown it is assignable and liable to execution. But it is said, that this is not the chattle of George Newell. Vid. *Stamf. Prerog.* 45. 17 E. 2. cap. 16. under the word *catalla* are only comprehended leases for years, the issues and profits of the lands of those that fly for felony, until such time as they shall be attained, and acquitted, and of clerks convict, until he has made his purgation, emblements growing upon the ground at the time the forfeiture of the goods first began to take place, a right of action to goods, as where goods are taken away wrongfully from a felon,

a felon, or where one is indebted to a felon by obligation, or is accountable to the felon for any receipts or otherwise. This statute of E. 2. does not give any thing, but only shews what shall be forfeited. Under the word catalla are sometimes taken, goods which the felon had no property in; as if a man delivers money out of a bag or corn out of a sack to one to keep, who is afterwards attainted of felony, the money or corn in such case is forfeited. *Stamf. Pr.* 45. 6. 6 H. 7. 9. a. 19 H. 7. 47.

It was objected, that it was not the extent, but the inquisition that bound the goods. But it was answered, that the inquisition was only an act in pursuance of the extent, and implied within the extent itself. It is an inquisition of information and instruction only, and not of intitling. It has such a relation to the extent, that the whole together makes but one execution. Suppose that there should be an extent and no inquisition at all should be taken upon it, but the sheriff should return that he had seized the debt; this would have been good, though the debt were in the hands of a third person; now, if this be sufficient grounds for you to bring an action for the crown, the inquisition is not material. It is but an inquiry to find the debt, but when there is an inquisition it is fuller and more entire. And there is a mistake in the conclusion of the plea *absque hoc*, that the defendant was indebted to the Queen *tempore inquisitionis*; for it should be that he was not indebted to the Queen at the time of the teste of the extent.

If there be a difficulty in making this relation, the inquisition finds every thing that was before the extent, but not any thing since the extent, but in pursuance of the power of the extent. It is but a bare information, and it doth relate to the extent. An inquisition upon an *elegit* relates to the *elegit*; so a bargain and sale enrolled, relates to the date of the bargain and sale. So if a seoffment be made with a letter of attorney to deliver seisin, and after an assignment is made by commissioners of bankruptcy, and then livery is made, this shall relate to the seoffment; for all is [108] but one conveyance. If goods are bailed or sold upon condition, and the bailee or vendee becomes bankrupt, and the commissioners assign his estate and effects, and then the condition is performed, this over-reaches the bankruptcy.

It was further objected, that it would be of dangerous consequence that extents should over-reach the debts which are to be distributed among the creditors. But it was answered, that an extent was a matter of record, whereof every person ought to take notice. When an inquisition is taken, though it be 100 miles off, it is no more than the extent itself. But it was said, that without this proceeding it might be of great damage to the crown; for tradesmen may commit an act of bankruptcy in a covenous manner, and so as it cannot be known, as it was done in this case; for here the creditors were very quick, and a commission of bankruptcy was taken out before the inquisition was taken, and it was their interest to defeat the extent, so that the danger attends the crown more than the subject. The person indebted is not any way

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way prejudiced; for it is the same thing to him, whether he pays the money to the one or to the other.

The act of bankruptcy itself does not bind the property, but that continues in the bankrupt until the assignment is made. 3 Keble 616. In debt on an obligation the defendant pleaded, that before the action brought, the plaintiff became a bankrupt; to which the plaintiff demurred; and per Cur. the plea is ill, and until an assignment, the debtor is defenceless. Payment of a debt to a bankrupt before the commission sued out, is good enough, and so it is before his debt be assigned. *Andrews v. Spicer*. By 1 Jac. cap. 15. §. 14. No debtor of the bankrupt shall be endangered for the payment of his or their debts truly and bona fide to any such bankrupt, before such time as he shall understand, and know that he is become a bankrupt.

Now in this case Arnold could not be damaged; for he did not know that Newell had committed an act of bankruptcy, but after he had notice of the bankruptcy, it was equal to him whether he paid it to the Queen, or to the assignees of the commissioners.

Besides the crown is taken notice of in 21 Jac. cap. 19. §. 10. It is thereby enacted, that if it shall happen, any of the lands, tenements, goods, chattles, debts, or other estate of any bankrupt, to be extended, after such time as he, or she, is become bankrupt, by any person or persons, under colour or pretence of his or their becoming an accomptant, or any way indebted to the King, his heirs or successors, it shall be lawful to and for the commissioners to examine upon oath, whether the said debt was due to each debtor, or accomptant, upon any bargain or contract originally made between such accomptant and the said bankrupt, the said debtor and accomptant, and his or their servants, and if such bargain or contract was originally made to and with any other person or persons, then the said debtor or accomptant, and for the use and trust of any other person or persons. The commissioners, or the greater part of them, may order and dispose of all such lands, &c. goods, chattles and debts, so extended as aforesaid, to and for the use of the creditors, &c. And this is now, as if it had said, that where a man shall be a bankrupt before such time, as that there is an extent sued out for a just and true debt, the commissioners shall not intermeddle with, nor sell the goods, there being such a lien upon the extent, so that upon the whole, the mischief and inconvenience will be on the part of the crown. Judgment for the Queen. Per Cur.

[109] (A. a) Partners. Where one is Bankrupt. How the other shall be charged, &c.

Lev. 17.
S. C. it was
argued by
Finch, that
B. may
bring ac.

1. **B.** And S. were two joint obligees; S. became a bankrupt, and the commissioners assigned the debt to B. the plaintiff, the co-obligee, (being himself a creditor) for the benefit of himself and the other creditors; the question was, whether this was

was a good assignment? per Windham J. if there be two obligees, the one cannot release the other, because a thing in action; and per Twissden J. the statute saith, that the assignee shall have the same action; but here the bankrupt cannot have an action without the other; adjournatur. Raym. 6. Hill. 12 Car. 2. B. R. *Boylstone v. Radcliffe*.

tion alone, and that this was the only method to recover the debt; for if it had been assign-

ed to another, he alone could not bring action for the moiety, and the action must be brought by the assignee, by the statute, in his own name, as before the bankruptcy it ought to be brought in the name of the obligee, and now all the interest is in B. the obligee, one moiety in his own right, and the other moiety for the advantage of the creditors, and therefore he alone shall maintain the action in his own name, he being obligee as to one moiety, and assignee as to the other, and all one and the same person, and therefore to be sued by him alone; for after the assignment it cannot be sued by him and B. and so this Windham J. inclined; but no one being ready on the part of the defendant, adjournatur.

2. Jones moved, that one who was partner with his brother a bankrupt, being arrested, might be ordered to put in bail for the bankrupt as well as for himself. Twissden said, that if there are two partners, and one breaks, you shall not charge the other with the whole, because it is ex maleficio; but if there are two partners, and one of them dies, the survivor shall be charged for the whole. In this case you have admitted him no partner, by swearing him before the commissioners of bankrupts; so not granted. Mod. 99. Hill. 21 and 22 Car. 2. B. R. Anon.

3. Action of trover well lies by the assignee of one partner a bankrupt against the other; and so ruled on a trial, and agreed now. 2 Keb. 750. pl. 3. Pasch. 23 Car. 2. B. R. *Thomas v. Day*.

4. If there are accounts between two merchants, and one of them becomes bankrupt, the course is not to make the other, who perhaps upon stating the accounts, is found indebted to the bankrupt, to pay the whole that originally was intrusted to him, and to put him for the recovery of what the bankrupt owes him, into the same condition with the rest of the creditors; but to make him pay that only which appears due to the bankrupt on the foot of the account, otherwise it will be for accounts betwixt them after the time of the other's becoming bankrupt, if any such were. Per North Ch. J. Mod. 215. pl. 1. Trin. 28 Car. 2, C. B. Anon.

5. Joint debts are to be paid out of the joint stock first, and if there be an overplus, then that ought to be applied to pay particular debts of each partner; but if there be not enough to pay all the joint debts, and if either of the partners shall pay more than a moiety of the joint debts, then such partner is to come in before the commissioners of bankrupts, and be admitted as a creditor for what he shall pay over and above his moiety. 2 Chan. Rep. 226. 34 Car. 2. E. of Craven & al' v. Knight, & al.

On a joint commission of bankruptcy against two traders, separate creditors are allowed to come in, but the joint effects are to be ap-

plied, first to pay the partnership-debts, and then the separate debts; and the separate effects to pay, first the separate creditors, and afterwards the partnership creditors; per Cowper C. a Vern. 706. Mich. 1745. *Crowder's case*. — Wms's Rep. 316. S. P. per Ld. Cowper. — S. R. a Wms's Rep. 500, by Ld. C. King. Mich. 1748. Ex parte Cook.

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6. If one or more of the joint traders become bankrupt, his or their *proportions only are assignable* by the commissioners, to be held in common with the rest who were not bankrupts. At Nisi Prius coram Holt Ch. J. 12 Mod. 446. Pasch. 13 W. 3. B. R. Anon.

7. If there be several joint traders, payment to one of them is payment to all; so if they all, except him to whom the payment was made, were bankrupts, the payment is only unavoidable as to his proportion. At Nisi Prius coram Holt Ch. J. 12 Mod. 447. Pasch. 13 W. 3. B. R. Anon.

(B. a) Creditors. Inter se.

1. **I**F a trader, being indebted on simple contract, pledges goods for the payment, and promises interest, such creditor shall have interest even between the act of bankruptcy and the commission; and for debts on specialty, the creditor shall have interest as well between the act of bankruptcy as before. Trin, 1716. Crosly's case.

2. Clerk of a commission in the presence of the person at whose instance he sued out the commission, no other person being by, opened a scutcheon, and took out several papers, and made a pretended sale; ordered to be examined on interrogatories, and pay the real value of the goods, and to be removed from the clerkship. Select Cases in Chancery in Lord King's time. 45. Trin. 11 Geo. Mozne, &c. creditors of Abraham.

3. A mortgagee shall have his interest run on upon a bankrupt's estate, because he hath a right in rem, but as to other interest, it ceaseth on the bankruptcy. Per Ld. Chan. King, 18 July 1729.

(C. a) Suits and Actions by Assignees; and Pleadings, &c.

1. 1 Jac. I. cap. 15. §. 13. **T**HE commissioners of bankrupts shall have power to assign, or dispose all the debts due to, and for the benefit of the bankrupt, to the use of the creditors, and the same disposition of the debts shall vest the property in the persons to whom it shall be assigned by the commissioners, as fully, as if the bond, judgment, or contract, whereupon the debt shall arise, had been made to the persons to whom the same shall be assigned; and after such assignment, neither the bankrupt, nor any other, to whom such debt shall be due, shall have power to recover the same, nor to make a discharge thereof; neither shall the same be attached as the debt of the bankrupt, or such other person; but the party to whom the same shall be assigned shall have remedy to recover the same in the name of the person, to whom the same shall be assigned, or ordered, as the party himself might have had.

2. Assignees

2. Assignees may sue actions *in their own names* for the debts due to the bankrupt; for they are transferred by act of parliament, but yet it is a debt upon record; but as in debt upon a contract, defendant might have *waged his law* against the bankrupt, so he may against the assignees. Cro. J. 105. Mich. 3. Jac. B. B. Bradshaw v. ———

3. A bankrupt indebted to A. in 20*l.* and to B. in 10*l.* both a debt due to him on a bond of 20*l.* The court was of opinion that this bond-debt may be assigned by the commissioners respectively to the creditors in proportion to their debts, and per Warburton J. when it is so assigned, they may severally sue for the same, because the act of parliament operates upon the assignment. Trin. 10 Jac. C. B. Godb. 195. pl. 282. Anon. [111]

4. Debt against administrator and declared that the intestate was indebted to J. S. 120*l.* for wares sold, and that J. S. became bankrupt, and was so adjudged by the commissioners, and this debt was assigned to the plaintiff being a creditor; it was insisted that by the assignment this is now quasi a debt on record, and the plaintiff enabled to this suit by act of parliament, and that *lay-gager* lies not; but resolved the action did not lie; for that debt upon a single contract lies not against an executor or administrator; and that the assignment by the commissioners of bankrupts did not alter the law, but that against an assignee, *wager of law* did lie; adjudged for the defendant. Cro. C. 187. pl. 6. Pasch. 5 Car. B. R. Morgan v. Green.

Jo. 223. pl. 2. S. C. adjudged; for that the assignee shall not have other remedy than the debtce himself had, which was by action of debt, or action on the case, in the life of the

debtor, and after his death by action on the case against his executor; for the statute which gives power of assignment, does not alter the course of the law for recovery thereof in other nature than the law before allowed, and gives no greater advantage to the assignee than the principal creditor himself had.

5. Though in case of bankruptcy it was once held that no *traverse* lay but on specially shewing the bailment before and conversion thereof, yet it has been since held to lie generally; per Cur. 3 Keb. 294. in pl. 22. Pasch. 26 Car. 2. B. R.

6. Assignees brought a bill to have an account against the defendant of the bankrupt's estate; the defendant pleaded that he was but a servant to the bankrupt, and likewise he had been examined by the commissioners upon the whole matter. But the plea was over-ruled and ordered to answer. 2 Vent. 358. Mich. 33 Car. 2. in Canc. Anon.

7. Case by the assignee of the commissioners of bankrupt; the defendant pleaded *non assumpsit infra sex annos*. Holt moved, that the assignment and promise, which give a new cause of action, are within the six years, and the assignee shall have a new six years. Cur. contra. The six years shall be accounted from the original action, and the new promise is but a fiction in law. The Court inclined to give judgment for the defendant but a discontinuance was granted, &c. Comb. 70. Mich. 3 and 4 Jac. 2. in B. R. Ashbrooke v. Manby.

Statute of limitations was pleaded to an assignee of commissioners of bankruptcy, and resolved by the court, that the statute of bankruptcy

transfers the right to the assignee, but it is no more than the old right which the bankrupt had before he had committed any act of bankruptcy, and therefore the assignee must take it in the same plight

right and condition as the bankrupt himself had it, and so it hath been adjudged in the case of *James and Plunkett*, that the assignee was in the same (as to the right) with the bankrupt himself, and accordingly, if he was barred by the statute of limitations, so shall the assignee. 8 Mod. 171, 172. 9 Geo. Grey & Broadish.

Though the assignee of the effects of a bankrupt claims under the act of parliament, yet as the statute of limitations might be pleaded against the bankrupt, by the same reason it is pleadable against such assignee; per Ld. Chancellor. 3 Wm's Rep. 144. Mich. 1738. South Sea Company v. Wymondsell.

8. Notice of the assignment of the debt is not necessary to be given to the debtor before action brought by the assignee for the debt. Lutw. 456. Trin. 4 Jac. 2. Slaughter v. Pierpoint.

Show. 7. S. C. but no judgment or opinion.

9. In a special action on the case brought by the plaintiff as assignee of the commissioners of bankrupts, he need not shew how the person became bankrupt. Carth. 29. Pasch. 1 W. & M. in B. R. Pepys v. Low.

Show. 200. to 208. S. C. adjournatur. The reporter adds, that we moved it several times, but could never get over the exception.

10. In ejectment brought by the assignees of commissioners of bankrupt, upon the bankruptcy of Alderman Backwell, in which these assignees were lessors of the plaintiff in ejectment, and a special verdict being found, which was now to be argued, the Attorney-General Trevor interrupted the arguing it, for that the verdict had abated the declaration, for it appeared by the verdict, that the demise to the plaintiff, upon which this ejectment was brought, was made by the assignees of the bankrupt before the enrollment of the bargain and sale, by which the commissioners had assigned the lands to the lessors of the plaintiff, and though the enrollment of a deed shall relate to the delivery of the same deed to avoid mesne incumbrances; yet every bargain and sale before enrollment is void, and cannot be made good by any relation, because the bargainee hath no estate before enrollment, and if so, he could not grant any estate; and here it appears, that the lessors of the plaintiff had not any title at the time of the demise, upon which the plaintiff declared; and the Court held this to be a fatal exception. Carth. 178. Hill. 2 & 3 W. & M. in B. R. Bennet v. Gandy.

5 Mod. 444. S. C. and as to the last exception, the Court held it supplied by those other words, and judgment for the plaintiff. — Ibid. states the case as an action of debt brought by the assignees, and

11. Action upon the case by assignee of commissioners of bankrupt, setting forth, that the bankrupt had recovered such a sum against defendant's testator, and that execution remained to be done, and the debt was assigned to plaintiff; and that goods to such a value of testator came to defendant's hands, which he converted to his own use. After verdict it was moved in arrest of judgment, because not said that his commission was obtained upon petition in writing as statute directs; sed non allocatur; for though Chancery may refuse to grant a commission without a petition in writing; yet if they will do it, it shall not vitiate; and this may be a supplemental commission, which requires no petition in writing; that it was not said in the declaration, that the money was not paid to the bankrupt before the act committed; but per Cur. saying that execution remained to be made, supplies that, and plaintiff had judgment. 12 Mod. 306. Mich. 11 W. 3. Turner v. Main.

exception was taken, because it was not said that the defendant had notice of this assignment; but per Holt Ch. J. no notice is necessary.

12. *Indebitatus assumpsit* by the assignee of commissioners of bankruptcy for goods sold after bankruptcy committed, lies, or may bring *trover*, but not both. 12 Mod. 324. Mich. 11 W. 3. *Hutley v. Fiddall*.

13. 5 Geo. 2. cap. 38. §. 38. Enacts, that no suit in equity shall be commenced, by the assignees, without the consent of the major part in value of the creditors present, at a meeting, pursuant to notice in the Gazette.

A doubt arising, whether an assignment over of a term by

the bankrupt was absolute, or by way of mortgage only; the question, at a meeting of the creditors for that purpose was, whether the assignees should bring a bill to redeem this leasehold estate, or not; but the majority of the creditors were of opinion not to do it, and the assignees being thereby disabled from doing it by this clause in this statute, the rest of the creditors, who were of opinion for bringing such bill, brought a bill in their own names against the supposed mortgagee and assignees of the commissioners praying to be let in to redeem. The assignees answered, that they were desirous it should be redeemed, but the supposed mortgagee opposed it. The question now was, whether this bill was well brought? And Parker, J. who sat for the Lord Chancellor, thought that it was, and that if the assignees refused to bring a bill, that is for the benefit of the bankrupt's estate, any creditor has a right to bring such bill, under peril of costs; and decreed. That the assignees, in the first place, have liberty to redeem; and in default thereof that the plaintiffs (the minor part of the creditors) shall have this redemption: Barn. Chan. Rep. 30. Pasch. 1740. *Franklyn v. Fern*.—But he said; that in general where there are proper persons to get in the estate of another, a court of equity will not suffer either the creditors of the testator, or the creditors of a bankrupt, to bring a bill in equity, in order to get in that estate; but if an executor or assignees, under a commission, will collude with a debtor, there is no doubt a creditor may bring his bill in order to take care of that estate, and charge the assignees or executors with such collusion. Barnard. Ch. Rep. 32.

14. When an action is brought by an assignee under a commission of bankruptcy, it need not be set forth in the declaration how he became assignee. 2 Barnard. Rep. in B. R. 309. Trin. 6 Geo. 2. *Hutchins v. Smith*. [113]

15. Where a person makes payment of a debt to a creditor, soon after he becomes a bankrupt, and the creditor had no notice of the bankruptcy, at the time he received the money; the assignees under the commission shall not be allowed to recover the money back again in an *indebitatus assumpsit*, but only in an action of *trover*. And the reason is, that they cannot insist upon having the money by way of contract, but as a tort. Barnard. Chan. Rep. 207. Mich. 1740. *Bourne v. Dodson*.

(D. a) Power of Assignees. As to making Dividends.

1. 5 Geo. 2. cap. 30. PERSONS chosen assignees shall, after §. 33. the expiration of 4 months, and within 12 months from the time of issuing such commission, cause 21 days notice to be given in the Gazette, of the time and place the commissioners and assignees intend to meet and make a dividend, at which time the creditors, who have not before proved their debts, shall be at liberty to prove the same; which meeting for the city of London, and all places within the bills of mortality, shall be at Guildhall; and upon every such meeting the assignees shall produce account of their receipts and payments, and of what shall remain out-standing,

out-standing, and shall (if the creditors present require the same) be examined upon oath or solemn affirmation, touching the truth of such account; and the assignees shall be allowed all just allowances, and the commissioners shall order such part of the neat produce of the said bankrupt's estate, in the hands of the assignees, as they shall think fit, to be divided amongst the creditors, and shall make such order for a dividend in writing, and shall cause one part of such order to be filed amongst the proceedings under the commission, and shall deliver unto each of the assignees a duplicate of such order, which order shall contain an account of the time and place of making such order, and the sum total of the debts proved, and the sum total of the money remaining in the hands of the assignees, and how much in the pound is then ordered to be paid; and the assignees in pursuance of such order, and without any deed of distribution, shall forthwith make such dividend, and take receipts in a book from each creditor.

2. 8. 37. Within 18 months after the issuing forth of any such commission, the assignees shall make a second dividend, in case the estate was not wholly divided upon the first, and shall cause notice to be inserted in the Gazette, of the time and place the said commissioners intend to meet to make a second dividend, and for the creditors, who shall not before have proved their debts, to come and prove the same; and at such meeting every assignee shall produce upon oath or affirmation his accounts, and what, upon the balance shall appear to be in his hands, shall by like order of the commissioners be forthwith divided, which second dividend shall be final, unless any suit shall be depending, or any part of the estate standing out, or unless some future estate of the bankrupt shall afterwards come to the assignees, in which case the assignees shall, as soon as may be, convert such future estate into money, and shall within two months after, by the like order of the commissioners, divide the same.

[114] 3. Commissioners of bankruptcy appoint a dividend to be made of the bankrupt's estate; a creditor under the commission neglects to receive of the assignees his proportion of that dividend; the assignees afterwards break, and run away with the dividend that was in their hands; the creditor shall not be allowed to come upon the bankrupt's estate for that money, but must take his remedy against the assignees as well as he can. Cited by Ld. Chancellor as a case that had been put; but his lordship said, That case wholly depends upon the deed of distribution made by the commissioners ascertaining the dividend; for if no such deed of distribution had been made, the creditor would have been allowed to have come upon the bankrupt's estate, and would not have been confined to have taken his remedy against the assignees. Barnard. Chan. Rep. 419, 420. Hill. 1740, in case of *Smith v. Duke of Chandos*.

(E. a) Assignees. Relation. To what Time their Interest relates.

1. COMMISSIONERS of bankrupt have only a power, and no estate, and to pass the estate, there must not only be a deed indented, but the indenture must be inrolled also, and in such case there is no relation; for in this case no time is mentioned within which it is to be done, so that it might extend to seven or twenty years, which would be dangerous, and judgment accordingly. 2 Jo. 196, 197. Perry v. Bowers.

Vent. 360. S. C. and the court said, that he is in an le post, and by the statute. It would be very inconvenient

to admit of relation, because no time prefixed for the inrolment. Sed adjournatur. Skinn. 30. pl. 6. S. C. argued. — 2 Show. 156. pl. 148. Berris v. Bowyer. S. C. adjudged, per tot. Cur. that inrolment is necessary before any thing can pass by such deed of assignment, or bargain and sale from the commissioners.

2. J. H. by special verdict appeared to be a bankrupt, and was committed two months in 1651, and recommitted for another act in 1657, and then the term for years, whereof he was possessed, was sold to the defendant by the bankrupt, and in 1660, the commissioners sold to the plaintiff. The words of the act are not after he shall first be a bankrupt, for then the earlier being a bankrupt, would after five years be a perpetual superfedas to all tradesmen; but, if one has sold, and then five years pass, without any act of bankruptcy, the purchaser is safe, and no after act can hurt him; but where the bankrupt continues in possession, any after act is sufficient to bind the term; judgment clearly for the plaintiff. Keb. 722. pl. 54. Pasch. 16 Car. 2. B. R. Spencer v. Venacre.

3. The plaintiff obtained a judgment in debt, and afterwards became bankrupt; the defendant brought error in the Exchequer Chamber, and there the judgment was affirmed, and the record sent back into B. R. Then a commission of bankruptcy was taken out, and the commissioners assigned this judgment; but the plaintiff sued out execution, and the money was levied by the sheriff, and brought into court, and then the assignee moved, that it might not be delivered to the plaintiff, surmising that the judgment was assigned to him as before; the court thought it would be hard to stay the money on a bare surmise, and for aught appeared it was the plaintiff's due. But, however, because it might be hazardous to deliver it to him, they consented to detain it, so as the assignee would forthwith take out a scire facias in order to try the bankruptcy, or otherwise that it should be delivered to the plaintiff. Vent. 193. Pasch. 24 Car. 2. B. R. Monk v. Morris.

Mod. 99. pl. 1. S. C. and the counsel agreed to take out a special scire facias, and try the special matter whether he be a bankrupt or not; and the court granted it.

[115]

4. Payment by debtor of a bankrupt either to the bankrupt himself, or to his creditor before notice of the bankruptcy, and before the commission sued forth, is a discharge against the commissioners, or the assignee; per Hale Ch. J. and Cur. 3 Keb. 190. pl. 38. Trin. 25 Car. 2. B. R. Grove v. Smith.

Per Cur. payment to bankrupt after notice is void, but if no notice, or if the

party be compelled to pay by suit, as here, before any commission sued out, it is a good discharge.

And judgment for the plaintiff, and anciently, till the commission sued out, the debtor ought not to re-pay, though he had notice of bankruptcy. 3 Keb. 290. Mich. 25 Car. 2. B. R. Prin v. Beal.

5. If a man *pays money* due to a bankrupt *before notice*, he shall not be charged for it again; but if he have notice, and it be recovered from him by law he shall not be charged neither; for perhaps nobody will take any commission out against him. Freeman, Rep. 349. pl. 435. Mich. 1673. Pym v. Benson.

Skin. 21. pl. 21. S. C. states it, that P. was a trader, and stood upon his privilege of parliament, as being the king's servant, and thereupon was discharged from an arrest, and

that he suffered himself to be outlawed, having notice of the exigent. Then he bound his son apprentice to P. the defendant, giving 20l. with him, which the commissioners assigned to the plaintiff. North and Windham J. held the payment of the 20l. not to be a provision, but Chalkon and Levins doubted; & adjournatur. But afterwards adjudged for defendant.

7. *Assignment of a term* by commissioners of bankruptcy was made to a creditor, who before inrollment of the deed of assignment made a lease to the defendant, and then the deed was inrolled. Per Cur. such a lessee cannot maintain an ejectment, because the lease could not have been before the inrollment; the words of the statute are, that commissioners may sell by deed inrolled; so without inrollment no sale. 12 Mod. 3. Mich. 2 W. & M. Elliot v. Danby.

2 Bernard. Rep. in B. R. 343. Mich. 7 Geo. 2. in

case of Bracey v. Dawson the Ch. J. said, He could not agree, that the bankrupt ceased to have the property of his goods at the time of the act of bankruptcy committed; the property does continue in him even till the assignment. The property is never in the commissioners, they have only the power given them of assigning the effects.

9. If there be an *act of bankruptcy committed*, and a creditor obtains a judgment subsequent to it, and then a commission is taken out; now the judgment is hereby avoided. At Nisi Prius coram Holt Ch. J. 12 Mod. 446. Anon.

10. Trover the plaintiff's title was under a bill of sale from the sheriff; the defendant's under an assignment from commissioners of bankrupt, the case was, A. was arrested at the suit of J. S. and put in bail; then surrendered himself in discharge of the bail, and continued in prison two months; so that by 21 Jac. cap. 19. by relation he became a bankrupt from the time of the arrest, which being prior to the bill of sale, the plaintiff had no property, and

and of that opinion was Holt Ch. J. but in this case the *commission of bankruptcy being taken out before the two months were expired*, he directed the jury to find for the plaintiff. Trin. 2 Ann. apud Guildhall.

11. One *Mills* the 14th of Oct. became a bankrupt; afterwards a judgment, &c. and a *fi. fa.* was had against his goods, &c. which were seized and sold. In December following a commission is taken out, and in March an assignment is made of the goods; and the assignees bring trover generally. Held, that if a man becomes a bankrupt, the property of his goods continues in him until assignment, but the property from the act of bankruptcy is so bound; that it cannot be altered until assignment. The assignee shall have all the goods the bankrupt had at the time of the bankruptcy being committed. The assignee doth come in the place of a bankrupt, but doth not represent him as an administrator doth his intestate. And if there had been a demand proved in this case, the trover would have lain, but without proving an actual demand by the assignee; it was held, that the action will not lie, per. Holt, but Powell J. contra. No judgment. Pasch. 7 Ann; *Hidgell v. Clare*.

1 Salk. 111.
pl. 8 Kiggil
v. Player,
Pasch. 7.
Ann. B. R.
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seems to be
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was argued,
that by the
assignment
the assignee
had a prop-
erty from
the time of
the bank-
ruptcy, and
there was

no mesne interval of time; as where one takes out letters of administration, he has the property from the death of the intestate, and may declare generally, *ut de bonis suis propriis*, even before an administration sued out; but Holt denied this, and said, he ought to declare specially, and so the plaintiff might have done in the principal case, and he relied on the case of *Perry v. Bowyer*, and said, the assignee was in by relation from the time of the bankruptcy, so as to avoid all mesne acts, but not so as to be actually invested with the very property; *ad jurnatur*.

12. An assignment from the commissioners has to many respects a relation to the time when the act of bankruptcy was committed. And therefore if after such act the bankrupt disposes of his effects, the assignment shall certainly over-reach it. Agreed by the Ch. J. 2 Barnard Rep. in B. R. 343. Mich. 7 Geo. 2. in case of *Bracey v. Dawson*.

13. And he agreed the same too, where a sheriff takes goods in execution of a bankrupt, and does not deliver them over to the party before the assignment made, the assignment shall not have a relation to defeat that execution; because there the execution was completed. 2 Barnard. Rep. in B. R. 343. Mich. 7 Geo. 2. in case of *Bracey v. Dawson*,

(F. a) Assignees Chosen; When; How; and by Whom; and How the Assignment is to be made.

1. 5 Geo. 2. cap. 30. **T**HE commissioners shall forthwith, after S. 26. they have declared the person a bankrupt, cause notice thereof to be given in the Gazette, and shall appoint time, and place for the creditors to meet (which meeting for the city of London, and all places within the bills of mortality, shall be at Guildhall) in order to choose assignees.

2. S. 27. No creditor, or other person on the behalf of any creditor,

Creditor and Bankrupt.

ditor, shall be permitted to vote in such choice of assignees, whose debt shall not amount to 10l.

* 3. S. 30. *It shall be lawful for the commissioners immediately to appoint assignees, which assignees shall be removed at the meeting of the creditors for choice of assignees, if the major part in value of them then present, and of such persons authorized as aforesaid, shall think fit; and such assignees as shall be removed, shall deliver up the effects unto the assignees chosen by the creditors, and all the estate; and if such first assignee shall neglect by the space of ten days (after notice in writing) to make such assignment and delivery, every such first assignee shall forfeit 200l. to be distributed amongst the creditors, and to be recovered by such person as the commissioners shall appoint to sue for the same.*

4. S. 31. *It shall be lawful for the Lord Chancellor, upon petition of creditors, to make such order for the choice of new assignees as he shall think just; and in case a new assignment shall be ordered, then such effects of such bankrupt shall be thereby effectually vested in such new assignees, and it shall be lawful for them to sue for the same in their names, and to give acquittance for debts as the assignees in the former assignment might have done; and the commissioners shall cause publick notice to be given in the two Gazettes that shall immediately follow the removal of such assignees, and the appointment of others.*

5. S. 42. *Enacts, that no schedule shall be annexed to any deed of assignment of the personal estate of such bankrupt.*

(G. a) Assignees. Bound by what Agreement, &c. made or done by Bankrupt.

1. **S**IR Stephen Evans had diamonds consigned to him by Governor Pitt to sell for his use; he charged them fraudulently at a less value than he sold them for, and after became a bankrupt; upon which a question arose, whether the assignees under the commission of bankruptcy should pay costs? and resolved they should out of the estate; for if he had been here himself, he must have paid costs, and the assignees stand in his place, as to his estate. But it appearing that the paper, in which he charged them at a less value than what he sold them for, was not delivered to Mr. Pitt, it was looked upon not as actual fraud, but only a preparation to it, of which he might have repented, so no costs against the assignees. Select Cases in Canc. in Lord King's time, 16, 17. Trin. 1725. Child v. Pitt.

2. *A person that sues out a commission may be discharged by the assignees, for they are trustees for the creditors, and may employ whom they please, and therefore the former one to deliver up all papers, &c. on being paid his bill. 23 December 1728. Ld. Chan. King.*

(H. a)

(H. a) Commissioners or Assignees. Punishable or Relieved. In what Cases.

1. **H.** And other the plaintiffs are creditors of a bankrupt, but **H.** the plaintiff was the principal creditor, and they all complain against the defendants, who were assignees, of the commissioners; for that they have recovered judgment for 331l. of the bankrupt's estate in the said H's hands; whereas the said bankrupt was indebted to him in 700l. and that H. and some other of the creditors, are willing to take their proportion of the said 331l. whose debts are now in danger of being lost, if the whole should be received by the defendant K. and others, assignees, &c. who had obtained the said judgment; and therefore they exhibited a bill for relief. The defendants demurred, for that there is no equity in the bill to change the law, by which the assignees are enabled to recover the bankrupt's estate, and there is no particular charge in the bill that makes the demands of the assignees unreasonable. The court decreed, that H. should prove his debt before the commissioners, and pay to the defendants their proportion of the said 331l. and costs to be distributed to them respectively. Fin. Chan. Rep. 264, 265. Trin. 28 Car. 2. Hawkins v. King.

2. **W.** a victualler, was greatly indebted to **M.** his brewer, and quitted that trade, and turned innkeeper, and borrowed money of **N.** his landlord, to buy goods to furnish his house, and for security thereof made a bill of sale to **N.** but kept the possession of them. Afterwards **W.** became further indebted to **M.** for drink delivered after his becoming innkeeper; but not being able to go on with his trade, he agrees with **N.** to give him security by a new bill of sale of the same and other goods, but before the execution **W.** by contrivance with **M.** commits an act of bankruptcy; and **N.** not knowing of the trick, accepts a new bill of sale. **M.** sues out a commission, and gets an assignment, and then brought trover for these goods. Holt Ch. J. held, Quod nullus dedixit, that if these goods of **W.** had been assigned to any other creditor, the keeping possession of them had made the bill of sale fraudulent as to the other creditors; but since the original agreement was as here, and so honestly and really made for securing the defendant's money lent to **W.** for the said purpose, the agreement was good and honest. Ld. Raym. Rep. 286. Hill. 9 W. 3. B. R. Meggot v. Mills.

3. 5 Geo. 2. cap. 30. S. 26. The assignees shall be obliged to keep books of account, wherein they shall enter all sums of money, or other effects, which they shall have received out of the said bankrupt's estate, to which books every creditor shall have free resort.

4. S. 42. If any commissioner shall order expences of eating and drinking to be made, or shall eat or drink at the charge of the creditors, or out of the estate of such bankrupt, or receive above 20s. each commissioner for each meeting, every such commissioner shall be disabled to act in any commission of bankrupts.

(I. a) Frauds between Bankrupt and Creditor:
after Commission issued.

1. 5 Geo. 2. cap. 30. **E**VERY security to be given to the use of S. 11. any creditor, as a consideration to persuade him to sign such certificate, shall be void; and the party sued on such contract may plead the general issue.

2. S. 24. If any bankrupt, after a commission issued against him, shall pay any money to the person who sued out the same, or deliver him goods, or other satisfaction, for his debt, whereby he shall privately receive more in the pound than the other creditors, such payment or satisfaction given shall supersede the commission, and the Lord Chancellor shall award to any creditor petitioning another commission, and the person taking such goods, or satisfaction, shall forfeit all he has received, or the value thereof, to be divided amongst the bankrupt's other creditors.

(K. a) Purchasers affected. In what Cases.

1. **L**ORD Chancellor said, There are frauds which equity can only relieve against; and there are other frauds where particular acts of parliament make the legal act void, &c. but that does not take away the jurisdiction of this court, which can give fuller and more particular relief. And a pretended sale of lands by Ward, shortly before his bankruptcy, to his brother, on 1 Jac. 1. cap. 15. was set aside, on bill by assignees, whereby voluntary conveyances, by persons who after become bankrupts, are void.

Objection, That such a conveyance would be void at law, and need not come into this court to set it aside; sed non allocatur. *MS. Rep. Hill. 1733. De Golls v. Ward.*

*MS. Rep.
1739. Read
v. Ward.*

2. Upon further hearing of this cause, issue being directed to try the bankruptcy of John Ward, upon trial at bar in B. R. in Easter Term last, he was found to become bankrupt 26 August, 1725. And now upon the equity reserved, plaintiffs (trustees for the S. S. Company) prayed an account, and to set aside conveyances that J. W. had made since his becoming bankrupt.

For defendant Knox Ward and wife it was insisted, that previous to their marriage by settlement, in June 1729, in consideration of 4000*l.* portion and the marriage J. W. agreed to purchase lands of 1000*l.* per ann. out of the sale of particular lands mentioned in that settlement, which lands were subject to several trusts precedent to the use of the marriage; and that they, being purchasers, were protected by the Stat. 21 Jac. 1. whereby it is provided, that no purchase made from a bankrupt shall be impeached, where the commission does not issue within five years after the bankruptcy committed, and in this case it did not, for the finding him to become bankrupt.

bankrupt is in August 1725, and the commission did not issue till November, 1730.

Mr. Attorney General for Knox Ward and Wife argued, that though their settlement is not by actual conveyance, yet it is a covenant * which binds specifick lands, and a purchaser in equity and *by ass* is within the intent of the statute, for the assignees are bound by the same equity as the bankrupt himself was, and cited the case of Taylor and Wheeler per Lord Cowper. Besides, here defendants had no notice of the bankruptcy, which includes notice of all the acts which constitute the bankruptcy, as being indebted and trading, &c. and of this opinion was Ld. Talbot in the case of Mr. Tylson's bankruptcy, where issue was directed as to the notice of his being a trader; but the statute Jac. 1. does not mention or regard the case of notice or not,

Mr. Floyd cited Lev. 13, 14. Radford v. as in point on the statute Jac. 1. And in equity the settlement covenanted to be made, is to be considered as made. The consideration is unquestionable, viz. marriage and a portion.

Mr. Brown for the plaintiffs argued, that defendants have shewn no conveyance to defendant Knox Ward; so the question is, whether plaintiffs are intitled to any relief against Knox Ward and wife? He agrees, that if they had been antecedent purchasers by conveyance, and for valuable consideration, they would be protected. As to the objection, That the articles in equity are to be considered as a purchase; he said, that in the articles John Ward does not covenant to settle, &c. but only as far as in himself lies he would ratify and confirm the articles; and the covenant, &c. to settle is by Knox Ward, who under former deeds was intitled to the surplus of the estate, which former deeds were all subsequent to J. W. his father's bankruptcy. As to the stat. 21. Jac. it extends to actual conveyances, and that are fairly and honestly made; and by Stat. 13 Eliz. cap. 7. as to conveyances before acts of bankruptcy, they are void, if the purchasers have notice of the fraud, &c. And it is strange to say, that a purchaser, after the bankruptcy, should be protected, though with notice of the fraud, &c.

As to the covenant by Knox W. on the marriage articles, it only relates to the general surplus—So that this is in nature only of a security to raise, &c. to purchase, &c.—All the declarations of the former trusts for the benefit of Knox Ward are void by the bankruptcy, and he was privy and party to all those deeds which were fraudulent (and it was said was the sole foundation of the jury finding J. W. a bankrupt.) As to Knox W. not having notice of the bankruptcy, it is without doubt he had, and knew his father to be a trader; besides, the statute, which makes the acts done amount to a bankruptcy, is notice to him and every body. As to the wife and her father, the several deeds, &c. and pretended transactions between J. W. and K. W. are all recited in the marriage articles, &c.—But per Lord Chancellor, the notice of the deeds is not sufficient, but that they were made with fraudulent purpose. Whereupon Mr. Brown said further, that the

the purpose of the deeds appears particularly from the very deeds themselves, and the wife and her father should have made inquiry as to the nature and intent of those deeds, &c. And that there is no proof of payment of the 4000l. portion, or of any part.

Lord Chancellor said, the great difficulty of this case is with respect to Mrs. Ward, the wife, and the issue of the marriage; for as to Knox Ward, he appears to have been party and privy to the fraudulent transactions of his father.—It is very rare that attempts in equity are made to set aside a marriage agreement.—He remembers *Shripton v. Wycherly* as the only one.—As to the objection, that this is only a legal conveyance, he agrees it is not, but by the articles the surplus is subjected to make good the intended purchase and settlement, &c. and J. W. is party to the articles.—There was no notice to the wife, or father, of the acts of bankruptcy.—As to notice of the deeds whence the bankruptcy arose, that is not sufficient.—And you cannot come to impeach a purchaser in equity without notice, any more than you can a legal conveyance, &c.—It is not sufficient to say that Knox W. was intitled to the surplus only as a volunteer; for if such fell for a valuable consideration, the purchaser shall protect himself, &c.—And he thought a purchaser by articles is a purchaser within the saving of the statute of 21 Jac. 1. so as to defend himself in equity, &c.—Knox W. is not within the statute, and he takes less by the articles than he had before, &c. Adjournatur.

Afterwards Ld. Chancellor declared that he had spoke with the Ch. J. of B. R. who had told him that the jury found J. W. bankrupt from executing the deed of 25 August, 1725, and that no act of bankruptcy was proved before or after, but the execution of that deed.—And no other act of bankruptcy till 1726.

The parties then by direction of his lordship went on into the cause.—The marriage articles of Knox W. were read, and Mr. Attorney-General of counsel for Knox W. & Ux. said, that the statute secures purchasers generally, *whether directly, or indirectly from bankrupts, &c.*—And in equity it is not material, whether the purchase be by actual conveyance, or by articles, &c. and the covenant binds, &c. and descends, &c. and cited the case of *Kirk v. Clark*, Preced. Ch. 223.—As to the objection, that Knox W. and his wife, &c. are to be considered as having notice, &c. there was no evidence as to that, except what is collected from the articles, but that is not sufficient;—Nor any thing but notice of the deeds which made the bankrupt in 1725; but then there should be notice that the creditors, for whom those deeds were made, were fictitious, &c. which was what made the bankrupt.—But suppose there was notice that there had been an act of bankruptcy by Mr. J. W. in 1725, they nevertheless were protected by the statute, because the statute is general, that no purchaser should be impeached where the commission does not issue in five years, &c. and asked, if that is saying, a purchaser without notice?—And the statute which mentions purchasers, as the statute of Eliz. for making void voluntary settlements, do not regard whether there is notice or not of the preceding settlement.

ment.—And the reason of the statute is, that if a man continues to deal for so many years, &c. without a commission of bankruptcy taken out, his acts shall be valid where they were for a consideration.—An equitable purchaser is within the statute, as in the other case on the statute of Eliz. As suppose A. pays a consideration for an equity of redemption, he shall be preferred in equity to a voluntary conveyance of the equity of redemption preceding, upon the equity of the statute.—It was also objected, that this purchase by the marriage articles is subject to the power by J. W. in the deed of September 7, 1725, where the power is to charge the premises with any further sum for payment of his debts.—And objected that the marriage articles is subject to this, &c.—Then as to these two questions; 1st. Whether the marriage settlement is subject to this power?—And 2dly, Whether, if it be, this power is transferred to the plaintiffs or the assignees?—1st. The power is not reserved in the marriage articles, all that is there is, that after the trusts performed in this former deed, &c. *Mr. J. W. ratifies and confirms, &c. the power and trust*; and J. W. agrees that the settlement be made of 1000l. a year out of a surplus arising after the trusts, &c. as in the former deed.—The power therefore is extinguished by the marriage agreement inconsistent with it as much as if it had been released.—Suppose J. W. had sold the estate, could he after execute the power, &c.?—Besides, here J. W. in 1727 did appoint several debts to be paid, &c.—The next question will be, whether the assignees (if the power did still exist) could have the benefit of it? For the plaintiffs was cited *Jordan v. Savage* [122] heard before Ld. King.—But the execution of this power would charge the estate he had sold, &c. i. e. contracted for; which is a sale in equity.—If the statute had not transferred estates in tail, the Court would not have compelled the bankrupt to have suffered a recovery, or levied a fine, &c. and yet this is a power in the bankrupt.—If the conveyance in 1725 by the bankrupt was void, then it remained in J. W. to convey for a valuable consideration.—So if considered as voluntary only, he would have it still in his power to convey to a purchaser.

Lord Chancellor said, this is an extraordinary case, and he believed none like it before, and hopes never will again; and therefore it is incumbent on the Court to do all they can to prevent the like. Here appears a scheme of fraud, through many years, to defraud just creditors.—The nature of the case is of a gentleman having a very great estate, and not greatly indebted, except the demand by the S. S. Company.—The deeds begin with the conveyance of 25th and 26th August, 1725. And by subsequent deeds all the real and personal estate, even to household goods, are vested in trustees to pay pretended creditors, the son joining with the father, but not one of the pretended creditors;—And no distress from any creditors, &c.—Amongst other trusts is the extraordinary power in the deed of 7 Sept. 1725 for J. W. to charge any other debts.—And last of all the whole surplus of all the estates is vested in the son Knox W.—Then comes the

the marriage articles in June 1729, and therein every one of the former deeds are recited to be in consideration of the marriage of K. W. with Mrs. and 4000l. portion (but not proved paid.) The surplus agreed to be subject to a term of 200 years to pay 400l. a year to Mr. J. W. for life, if he shall particularly demand it, and then for K. W. and his wife; then to purchase lands of 1000l. per ann. in tail general to K. W. remainder to his right heir, with power, as to portions for children; and power for trustees to provide coach and horses for Mr. J. W.—Then there is another deed of sooner date by K. W. the son, subjecting the manor of W. to same uses.—A bill was brought by the assignees to set aside these deeds, &c. an issue was directed and the jury find J. W. bankrupt 26th August 1725, being the date of the first deed of release, by which that deed is overreached.—And the judges certify, that this deed was the act of bankruptcy, as being made to defraud his creditors.—The question is, what the consequence of this verdict is?—1st. in law, —and next, how in equity—At law this deed and all subsequent ones are void. But it was objected from the statute 21 Jac. 1. that the commission of bankruptcy was not taken out till 20th November, 1730, above five years after the act of bankruptcy, and by a clause in that statute, purchasers in such case are not to be impeached, &c.—But he holds that this clause only protects purchasers bona fide, without notice of the fraud and act of bankruptcy.—And here Knox W. must have had notice of the act of bankruptcy, because party to the very deed that made the bankruptcy, so that K. W. is not protected by this deed;—Next here in equity,—And here we must take notice, that there are circumstances of actual fraud, and here appears a long series from 1725.—The power in the deed of September 1725 to charge the estate with any other debts is fraud apparent, because it reserves in effect the whole estate in the bankrupt himself, &c.—The next consideration is, how far the several defendants are to be affected.—This is to be considered in two respects; 1st. Under the deeds from 1725, prior to the articles; 2dly, How upon the marriage articles?—1st. As to the deeds prior to the articles they concern the trustees for the pretended creditors, and those creditors; but no proof of any real debts; and the first deed for that reason found void, and therefore this is out of the case. Then the question is under those deeds, how it stands with Mr. K. W. and he holds that he is affected with the act of bankruptcy and fraud, being party to the first deed, &c. and at best, it is all voluntary as to him, and the surplus in all the subsequent deeds is reserved to him.—Next as to the marriage, and here is the only appearance of difficulty;—So as to the persons provided for; and as to J. W. himself he cannot partake of the consideration.—All the parties to be considered are, Knox Ward and Mrs. Nettleton the intended wife, and the issue.—1st. As to Knox Ward, his case is not immediately the marriage articles, he had notice of the bankruptcy of his father before. It was objected that K. W. is to be considered as a purchaser by the articles, and

and the statute not mentioning notice, and where the commission is not sued out within five years, &c.—He holds that articles in equity are the same as actual conveyance at law, and no more to be impeached in equity; but holds, that K. W. takes nothing under the articles but what he had before.—And it is strange for him to take more and better interest than before; but suppose it so, he holds the clause in the statute 21 Jac. 1. not to be considered in the large sense contended for so as to extend to all purchases, but holds that this clause is to be compared to the clause in the statute 13 Eliz. cap. 7. which provides against purchasers having notice of the fraud, &c. The statute 21 Jac. takes notice of the former acts against bankrupts, and is for further provision for creditors, &c.—Therefore holds this like the case, and warranted by the construction made on the several statutes about leases by ecclesiastical persons, 1 Vent. 244. Bayly v. Murin, the last resolution in that case.—And so holds that all the statutes against bankrupts are to be construed together and to be considered all as one statute, &c.—And no pretence but Mr. Knox W. had notice, &c. and therefore holds that Mr. Knox W. cannot protect himself under the statute.—Next as to the wife and issue. Mrs. N. for what appears, is an innocent person;—no evidence to shew her father had any other notice than what appears from the deeds;—But thinks notice of the deeds is not notice of the fraudulent intent of these deeds, other than as to Mr. K. W. who was party, &c.—And if Mrs. N. had not notice of the bankruptcy, she cannot be affected in equity by the bankruptcy.—Next as to the issue of the marriage. First, as to the heirs of the body of Mr. K. W. that is an estate tail in him.—Agrees that in marriage articles where the limitation is to the heirs of the body by the wife, there it shall be carried into strict settlement, but otherwise where the limitation is general to all the issue, and that this was the real intent appears by the provision of 6000l. which is expressly for the issue of the marriage, and extends to the eldest son, as well as to the rest of the children.—This 6000l. is secured by a power and trust. He holds that the issue are to be affected with the notice to the father, and mother, and trustees.—As to the objection by plaintiffs, that the provision is of the surplus only after the fictitious debts, &c.—But this would be strange, and their provision ought to be after what was really due.—As to Mr. J. W's power to charge other debts, he holds his joining in the marriage was an extinguishment of that power, and amounted to a revocation.—Therefore held and decreed the marriage articles to be set aside, as to all the uses, except as to the jointure of the wife, and the 6000l. for the issue. MS. Rep. Mich. 1739. Read v. Ward.

(L. a) Reward to Discoverers of Bankrupt's Estate.

1. 5 Geo. 2. cap. 30. **E**VERY person who shall (after the time S. 20. allowed to such bankrupt) voluntarily make discovery of any part of such bankrupt's estate, not before come to the knowledge of the assignees, shall be allowed five per cent. and such further reward as the assignees, and the major part of the creditors, in value, present at any meeting of the creditors, shall think fit.

(M. a) Concealments of Bankrupt's Estate punished.

1. 13 Eliz. cap. 7. **I**F the creditors of any bankrupt be satisfied their debts with the proper lands, goods, and debts of the bankrupts, or with the same and some part of the forfeitures, and there shall remain an overplus of the said forfeitures of the double values; the one moiety of the overplus of the forfeitures, shall be by the commissioners paid unto the Queen, and the other moiety shall be distributed amongst the poor within the hospitals in every city, town, or county where such bankrupt shall be.

2. A commission being sued out by the bankrupt's father-in-law, to whom the bankrupt, before suing out the commission, had made over all his effects except a few shillings, and some desperate debts, was held by Ld. C. Parker, to have been plainly sued out fraudulently to discharge the bankrupt. Wms's Rep. 1560. 1563. Trin. 1719. Ex parte Salkeld.

* But the counsel insisted, that the assignment was of all his stock in the wine trade.

—If the assignment had been, of all his goods and effects, or of all his estate, or all his stock in trade, as goldsmith, &c. this had been too general, and

3. A goldsmith being much indebted shut up his shop, and having a stock likewise in partnership in the wine trade, assigned two * thirds thereof to J. S. a creditor, (who had been particularly assisting to him) without his knowledge, being worth about 300l. and never after opened his shop again, but the next day went off, and was after found to have become bankrupt such a day after the day of the assignment. On a bill by J. S. against the assignee, and the partner in the wine trade, the Master of the Rolls held the assignment good. And held, that there might be just reason for one becoming bankrupt to prefer one creditor to another, as where he was a faithful friend, or money lent in extremity without profit, and all that such creditor has to subsist upon, whereas dealers in trade may have been gainers. And that the time of the assignment, if made before the bankruptcy, is not material, but the justice of the deb. And its being made without notice of the creditor is no objection; for this shews that there was no fraud or importunity. And if such assignment to a single

single creditor be a *chefe en action*, he may apply for relief here, for he can go no where else. Otherwise if a *legal estate* had been conveyed. His honour cited some precedents, and said, that though preferring some creditors, in hopes of after favours, may be of mischievous consequence, yet by reason of the precedents, he must decree in favour of the assignment. 2 Wms's Rep. 427. Mich. 1727. Small v. Oudley.

trade, of a stock in * wine, in all not above 300l. and but two thirds of that. Ibid. 431. in a note added by the reporter, (as it seems) at the end of the case, says it was so said by the Master of the Rolls.

would hardly have stood; but here it was not of the trader's own trade, but a *small branch of a different*

* [125]

4. A. a trader was just on the brink of bankruptcy, a *deed ready ingrossed* was brought to him, which he executed a little before his bankruptcy, and in contemplation thereof, to give a preference to some of his creditors. Cited by the master of the Rolls, as the case of Jacob v. Shepherd, and said, that he doubted thereof; but that on appeal, Ld. Macclesfield ordered a trial, to be informed when the trader became a bankrupt, and the execution of the deed being found to have been before the bankruptcy, it was decreed in favour of the deed. 2 Wms's Rep. 431. in case of Small v. Oudley.

S. P. cited by the Master of the Rolls. 2 Wms's Rep. 431. to have been decreed in Sir Stephen Evans's case.

5. 5 Geo. 2. cap. 30. S. 21. Every person who shall have accepted of any trust, and shall wilfully conceal any estate of any bankrupt, and shall not, within 42 days after such commission shall issue, and notice given in the Gazette, discover such trust and estate in writing to one of the commissioners or assignees, and submit it to be examined (if required) shall forfeit 100l. and double the value of the estate concealed to the creditors.

(N. a) Of setting off where there are mutual Debts between Bankrupt and Creditor, and of submitting to Arbitration, and compounding Debts due to Bankrupts.

1. **W**HERE there is mutual credit between a bankrupt and a creditor, the balance shall only be paid, and the clause in the statute is not to be construed of dealings in *trade* only, or in case of *mutual running accounts*, but also where one credit is upon mortgage, and the other upon note, per Ld. Cowper, and he said, that in all cases of mutual credit it is natural justice and equity, that only the balance should be paid. Wms's Rep. 325, 326. Trin. 1716. Ld. Laneborough v. Jones.

2. Sir Stephen Evans in the year 1711 had 5000l. stock in the *Hudson's Bay Company*, and was their banker or cashier, and upon that account was indebted to the company in 800l. and soon after became a bankrupt; the assignees bring a bill against the company to transfer the 5000l. stock to them with all dividends due thereon; the company by their answer insist, that by virtue of a *by-law* in these words, (viz.) "That the stock and dividend of each adventurer shall be obliged for such debts and engagements"

MS. Rep. Mich. 18 Geo. Gib-son & al' assignees of Sir Stephen Evans, bankrupt, v. Hudson's Bay Company.

" 23

"as such adventurer shall become engaged in to the company;
 "and that the committee of the company for the time being,
 "shall and may distrain the same until such debts and engagements
 "are fully satisfied," the company is not obliged to transfer the
 stock to the complainants, until they pay the 800l. due to the
 company, and they likewise insist upon the clause in the *statute of*
bankrupts, 5 Geo. that, "where it shall appear to the commis-
 "sioners, that there has been mutual credit by the bankrupt, and
 "any other person, at any time before the person, against whom
 "such commission is or shall be awarded, became bankrupt, the
 "said commissioners shall state the account between them, and
 "what shall appear to be due upon the balance of such account, and
 "no more shall be claimed or paid on either side." And that
 [126] Sir Stephen Evans having credit in their books for 5000l. stock;
 and the company on the other side having credit in Sir Stephen
 Evans's book for 800l. they ought to *deduct and have an allowance*
 of the 800l. out of the 5000l. stock.

It was argued for the plaintiffs, that the by-law to distrain the
 adventurer's stock for a debt due to the company, was contrary
 to law, and a void by-law, that it gave the preference to a simple
 contract before a debt by specialty or judgment, that it sub-
 verted the legal course of administration; that if an adventurer
 died indebted by simple contract to the company, that debt by
 simple contract would be satisfied before debts by specialty or
 record to other persons; that this by-law was contrary to the
 statute of bankrupts, which makes all debts equal, and to be paid
pari passu, which is most agreeable to natural justice and equity;
 and supposing it might bind the adventurer himself as an agree-
 ment, yet it would not bind the assignees, who are trustees for
 the creditors, and the stock and effects of the bankrupt vested
 in them, by act in law, and not by the party; that this case was
 out of the clause of the statute 5 Geo. cap. 24. of stating accounts
 where mutual credit had been given, that clause extends only
 to mutual debts, here the company is not debtors to the pro-
 prietors of the stock, nor can they demand the value of the stock
 from the company, the company is only a trustee for the pro-
 prietor, and not their debtor, &c.

It was argued for the defendant, that this was a good by-law
 to bind the members of the company, that such an agreement
 among partners in trade would be good, that if any of the part-
 ners borrowed or took any money out of the joint stock, that
 his share and interest in the joint stock should be liable to make
 satisfaction for such debt, that the company having the controul
 and power over the proprietors stock, might reasonably detain the
 stock, till they were satisfied for a debt due to them from such
 proprietor, that the assignees were in the same condition with the
 bankrupt himself, they stand in his place, and must take his estate
 and effects, subject to the engagements and charges they were
 liable to in the hands of the bankrupt. 2dly, That this case was
 within the clause of the statute 5 Geo. cap. 24. of mutual credit,
 &c. and that Sir Stephen Evans was a creditor of the company.

for his 500*l.* stock, and the company a creditor of Sir Stephen Evans for the 800*l.* due to them, that the stock is called credit in the books of the company, and he has a demand against the company for the interest and produce of the stock, and though there was nothing due to Sir Stephen Evans for dividends at the time of his bankruptcy, yet, the stock itself was a debt from the company, and so within the clause of the act of setting one debt against another, and only the balance due to Sir Stephen's assignees, that it would be very unreasonable where there are mutual dealings and credit, that the debtor to the bankrupt should be bound to pay the whole due from him to the bankrupt's estate, and *e contra* should only come in as a creditor, under the commission for all due to him, and receive perhaps only two or three shillings in the pound for his whole debt, &c.

King C. was of opinion that the by-law was not good. It was assuming a legislative power, and altering the law, it was different from an agreement between private partners in trade; these sorts of companies were of a publick nature, all people were admitted into them, and great part of the personal estates of the kingdom were invested in them; that it did not only make debts by simple contract, equal to specialty and judgments, but gave them the preference. It gave them a power to attach their creditors effects, [127] and to be their own carvers; it subverted the legal course of administration, and was inconsistent with the statute of bankrupts, which makes all debts equal, &c.

But Raymond Ch. J. and Mr. Baron Price, who assisted his lordship, thought it a good by-law, it extends only to their own members, and tends to the benefit and advantage of the corporation. All by-laws for the benefit and advantage of trade are good, unless such by-laws be unreasonable or unjust, that this, in their opinion, was neither; not unreasonable, because it extends only to their own members, whose consent is implied in all by-laws, and every man that buys stock must take it subject to the engagements laid upon such stock by the company; it is not unjust, because the stock is only to be retained as a pledge till the debt be satisfied, which every debtor in justice is bound to do; that the assignees stand in the place of the bankrupt, and can be in no better condition than the bankrupt himself.

King C. said, I think this case is within the clause of the statute 5 Geo. of setting off debt against debt, so need not give any direct opinion as to the by-law, here is mutual credit given, and therefore I think the company may retain the 800*l.* due to them, out of the dividends due to the bankrupt's estate, subsequent to the bankruptcy, and shall not be obliged to come in as a creditor under the commission, and decreed accordingly. MS. Rep. Mich. 12. Geo. Gibson & al' assignees of Sir Stephen Evans, bankrupt v. Hudson's Bay Company.

N. B. The judges gave no direct opinion as to this last point, but seemed to agree with the Chancellor.

3. 5 Geo. 2. cap. 30. S. 28. *Where it shall appear that there has been mutual credit given, or mutual debts between the bankrupt and any other person, the commissioners or assignees shall state the*

Creditor and Bankrupt.

account, and one debt may be set against another, and the balance of such account shall be claimed or paid.

4. S. 34. It shall be lawful for the assignees, with the consent of the major part, in value of the creditors present, at any meeting, pursuant to notice in the Gazette, to submit any difference between such assignees, and any person whatsoever, or by reason of any matter relating to such bankrupt, to the determination of arbitrators, or otherwise to compound the matters in difference, as the assignees with such consent can agree.

5. S. 35. The assignees are empowered with consent of creditors, to make composition with any debtors to such bankrupts, where the same shall appear necessary.

(O. a) Demeanor and Crime in Bankrupt's not appearing and discovering his Effects; and How the Commissioners are to proceed for that Purpose.

1. 13 Eliz. cap. 7. ¶ If any such persons, which shall be indebted,

[128] S. 9. I do of purpose withdraw themselves from their usual mansion houses, upon complaint, the commissioners shall have power to award five proclamations, to be made in the Queen's name, upon five market days, in such places near the place where such bankrupt has most commonly made his abode, commanding him to return with all convenient speed, and to yield his body before the commissioners, or one of them, at such time and place as by the proclamation shall be appointed; and if he do not, according to such proclamation, yield his body, then the body of such offender shall be adjudged out of the Queen's protection; and every person that shall willingly help to hide or convey, or shall willingly receive, or keep secretly, any person so demanded by proclamation, shall suffer imprisonment, or pay such fine to the Queen, as to the Lord Chancellor (being informed thereof by the commissioners) shall seem meet.

2. 1 Stat. 1. cap. 15. S. 8. If he refuse to be examined, or to answer fully, the commissioners may commit him close prisoner till he conform.

3. S. 9. If, upon his examination, it shall appear that he has committed any wilful or corrupt perjury, to the damage of his creditors, to the value of 10*l.* and be convicted thereof in any court of record, he shall have one of his ears nailed to the pillory, and cut off.

4. 21 Jac. 1. cap. 19. S. 7. If any bankrupt shall, upon his examination before the commissioners, be found fraudulently to have conveyed away his goods, lands, or other estate, to the value of, 20*l.* to the end to hinder the execution of the statutes, or to defraud, or hinder his creditors of the same, and shall not upon his examination discover unto the commissioners, and (if it lie in his power) deliver unto them all that estate so fraudulently conveyed away, or detain, or that cannot make it appear unto the commissioners that he has sustained some casual loss, whereby he is disabled to pay what he then owed,

owed; may be indicted for such fraud or abuse at the assizes, or general sessions of the peace of the county or place where he shall become bankrupt; and if the bankrupt be thereof convicted, he shall be set upon the pillory for two hours, and have one of his ears nailed to the pillory, and cut off.

5. 5 Geo. 2. cap. 30. §. 1. If any person who shall become bankrupt, and against whom a commission of bankrupt under the great seal shall be issued, whereupon he shall be declared bankrupt, shall not within 42 days after notice in writing left at the usual place of abode of such person, or personal notice, in case such person be in prison, and notice in the London Gazette, surrender himself to the commissioners, and subscribe such surrender, and submit to be examined upon oath, or solemn affirmation, and conform to the statutes concerning bankrupts, and upon his examination discover all his effects, and how he has disposed of his effects (and all books and writings relating thereto) of which he was possessed or interested, or whereby such person or his family has, or may expect any possibility of advantage (except such parts as shall have been bona fide disposed of in the way of his trade, and except such money as shall have been laid out in the ordinary expence of his family) and also, upon such examination, deliver up unto the commissioners such part of his effects, and all books and writings relating thereto, as shall be in his power (his necessary wearing apparel, and the necessary wearing apparel of the wife and children of such bankrupt excepted) then the bankrupt, in case of default in not surrendering and submitting as aforesaid, or in case he shall conceal, or embezzle his estate to the value of 20l. or any books of accounts or writings relating thereto, with intent to defraud his creditors (and being convicted by indictment or information) shall be deemed guilty of felony, without benefit of clergy; and such felon's goods and estate shall go among the creditors seeking relief under such commission.

6. §. 2. The commissioners shall appoint, within the said 42 days for the bankrupt to surrender and conform as aforesaid, not less than three meetings, the last of which shall be on the 42d day limited for such bankrupt's appearance; and three weeks notice shall be given in the Gazette of the time and place of such meetings.

7. §. 3. It shall be lawful for the Lord Chancellor to enlarge the time for such person surrendering himself, and discovering his effects, not exceeding 50 days from the end of the said 42 days; so as such order for enlarging the time be made six days before the time on which such person was to surrender himself.

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8. §. 36. After such bankrupt shall have obtained his certificate, and the same shall be confirmed, such bankrupt shall be obliged to give his attendance, upon notice in writing to attend the assignees, in order to settle any account of such bankrupt's estate, or to attend any court of record, to be examined touching the same, or for such other business, which such assignees shall judge necessary for getting in the bankrupt's estate, for which attendance the bankrupt shall be allowed 2s. 6d. per diem; and in case such bankrupt shall neglect to attend, or refuse to assist in such discovery, without good cause to be shewn to the commissioners to be by them allowed (such

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assignees making proof thereof upon oath, or solemn affirmation, before the commissioners) the commissioners are required to issue a warrant, to such persons as they shall think proper, for apprehending such bankrupt, and him to commit to the county gaol, there to remain in close custody, until he shall conform to the satisfaction of the commissioners, and be by the commissioners, or the order of the Lord Chancellor, or by due course of law discharged; and such gaoler is required to keep such person in close custody, within the walls of the prison, under the penalties before mentioned, for suffering such prisoners to escape.

(P. a) The Bankrupt's Person protected. In what Cases.

1. **I**N debt on obligation, the defendant pleaded, that before the action brought, the plaintiff became a bankrupt, to which the plaintiff demurred, and per Curiam, it is an ill plea; and until an assignment be made, the debtor is defenceless; and [cited] therefore [the case of] HANSON AND HALE [that] payment, before a commission sued out, is well enough, and so it is before his debt be assigned. And judgment for the plaintiff. 3 Keb. 616. pl. 78. Hill. 27 and 28 Car. 2. B. R. Andrews v. Spicer.

2. A man rents an house for years, by lease, at C. and becomes a bankrupt, and surrenders all his goods and effects to the commissioners, according to the 4 and 5 Ann. Reg. and with the rest, this lease: and his certificate was allowed; but being taken into custody for non-payment of the rent since, he moved by counsel to be discharged; but the court would not grant it, and forced him to put in bail, for they said, the act of parliament did not make void the contract between him and his landlord. Pasch. 6. Ann. Reg.

3. Two persons having authority to seize the effects of a bankrupt, broke open a closet, where the bankrupt was, to search for them; two officers came soon after them, and took him in an action, and threw him into the Compter, where he was served with several other actions in custody. It was ordered that they, at their own costs, should procure him to be discharged out of custody, or to stand committed, being an abuse of the process of the Court. Sel. Cases in Chan. in Ld. King's Time. 64. Mich. 12 Geo. Anon.

[130] (Q. a) False Claim of Debts. Punishment thereof.

1. 5 Geo. 2. cap. 30. **I**F any person shall before the commissioners, or by affidavit or affirmation exhibited to them, swear or affirm, that any sum of money is due to him from any bankrupt which is not really due, knowing the same to be not due, and being convicted by indictment or information, such person shall suffer

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suffer the penalties inflicted by the statutes against wilful perjury, and shall be liable to pay double the sum so sworn or affirmed to be due.

(R. a) Surplus and Allowance.

6. 13 Eliz. cap. 7. **S**UCH of the commissioners as shall put the commission in execution, shall, upon request made by the bankrupt, not only make declaration to the bankrupt of the employing and bestowing of their lands, goods, and debts, but also make payment of the overplus, if any be, to the bankrupt.

2. 5 Geo. 2. cap. 30. S. 7. All bankrupts who shall surrender and conform, as by this act is directed, shall be allowed 5 per cent, out of the neat produce of the estate that shall be received, in case the neat produce of the estate, after such allowance made, shall be sufficient to pay 10s. in the pound, and so as the said 5 per cent. shall not amount to above 200l. and in case the neat produce of the estate shall be sufficient to pay 12s. 6d. in the pound, then all persons so conforming, shall be allowed 7l. 10s. per cent. so as such allowance shall not amount to above 250l. and in case the neat produce shall, over and above the allowance, be sufficient to pay 15s. in the pound, then persons so conforming, shall be allowed 10 per cent. so as such 10 per cent. shall not amount to above 300l. and every such bankrupt shall be discharged from all debts owing at the time that he did become bankrupt.

3. S. 8. If the neat proceed of such bankrupt's estate shall not amount to 10s. in the pound, such bankrupt shall not be allowed the 5 per cent. but shall be allowed so much as the assignees and commissioners shall think fit, not exceeding 3 per cent.

4. S. 12. Nothing in this act shall give any advantage to any bankrupt who shall, upon marriage of any of his children, have given above the value of 100l. (unless he shall prove by his books, or otherwise upon his oath or affirmation before the commissioners, that he had remaining other estate sufficient to pay every person, to whom he was indebted, their full debts) or who shall have lost in one day the value of 5l. or in the whole the value of 100l. within 12 months next preceding his becoming bankrupt, at cards, dice, tables, tennis, bowls, billiards, shovel-board, or cock-fighting, horse-races, dog-matches, or foot-races, or other game, or by bearing a share in the stakes, or betting, or that within one year before he became a bankrupt, shall have lost 100l. by contracts for stock, or shares of any publick funds, where such contract was not to be performed within one week from the making, or where the stock was not actually transferred.

(S. a.) Certificate and Discharge.

1. 13 Eliz. cap. 7. **I**f the creditors, of any bankrupts which depart the realm, keep their houses, or otherwise withdraw into places unknown, or suffer themselves to be arrested, or outlawed, or yield their bodies into prison purposely to defraud the creditors, be not fully satisfied for their debts by the means before specified, they shall have their remedy for levying the residue against the offenders, as they might have had before the making of this act. And the said creditors shall be only barred for such part of the said debts as shall be paid unto them, as aforesaid.

3 Geo. 2. cap. 30. S. 7. the same matter enacted.

* This extends not to debts due to a bankrupt as executor,

but it is for this particular reason; because they are appropriated to pay testator's debts, and if they were assigned it would be a wrong, viz. a devastavit; and it being objected, that it extends not to debts due to the bankrupt jointly with another, it was answered by Ld. Ch. J. Parker, in delivering the opinion of the Court, that the case cited for that purpose from 1 Lev. 17. is not determined. Wms's Rep. 254. in case of Miles v. Williams.

A plea upon this act must conclude to the country, and not to the judgment of the court. Adjudged. Trin. 1714. B. K. Wms's Rep. 249. 260. Miles v. Williams.

3. If a bankrupt has a certificate, and an action be brought against him afterwards for a debt precedent to the statute, he may plead his certificate upon the roll, and so prevent a judgment from being entered up afterwards, but having neglected so to do, it was his own default, and a court of equity is not to relieve either his pleading, or his want of a plea, or no proper plea put in in time, nor could he be relieved on an *audita querela*, because he had an opportunity and might have pleaded his certificate before the judgment was entered, and upon producing some precedents where bankrupts had been relieved against judgments obtained against them, they did not come up to the case in question, and the petition was dismissed. 2 Vern. 696, 697. Trin. 1715. Goodwin's case.

4. Commissioners of bankruptcy having made an assignment of the bankrupt's estate, and afterwards given the bankrupt his certificate and discharge, cannot make a subsequent assignment. Wms's Rep. 386. Mich. 1717. Jacobson v. Williams.

5. Gore brought an action, for rent, against Bagshall a bankrupt, and obtained judgment before bankrupt's certificate was allowed by Ld. Chancellor, and the certificate not being allowed till after the rules of pleading were out, the bankrupt had no opportunity to plead his certificate, and take the benefit of the act 4 Ann. but in the *scire facias* against the bail the certificate was pleaded, and

And the plea over-ruled; so that the bankrupt has no relief but in equity, or by *audita querela*, which is an equitable remedy at law. A motion was made by Sir Joseph Jekyl, for an injunction; but Cowper C. denied the motion, (though Sir Joseph Jekyl said, there were several precedents of injunctions of this sort, but had none ready to produce) because this was a *merciful law made in favour of the bankrupt and in prejudice of the creditors, and therefore not to be extended in equity farther than at law. MS. Rep. Mich. 3 Geo. in Canc. *Bagthall v. Gore*.

6. A. a creditor of B. brought an action at law, and having got judgment, took him in execution, on a ca. sa. Afterwards the act of 5 Geo. was made, where by cap. 24. a bankrupt, if he surrenders, is examined, and 4 fifths in value and number of his creditors sign his certificate and testify their consent, &c. is to be discharged. After which statute a commission is taken out against B. by C. B's father-in-law, and A. is persuaded to come in and be an assignee to prevent the sinking the estate, and getting him discharged. The estate of B. (besides what he had, before the statute, made over to C.) was only some few shillings and some desperate debts. It was insisted that fraud appearing, equity would not interpose in prejudice of an honest creditor, and favour of the bankrupt, which Ld. C. Parker admitted. And as to A's coming in and proving the debt, it was argued, that it might be thought necessary in order to prevent B's discharge, and this his lordship held reasonable. And that as to not detaining the body, where all the bankrupt's estate was to be seised, here was no estate left to seise, all that being made away to C. And that in this case A's coming in, cannot be construed an election to be paid out of B's estate, and so a waiver of his former execution of the body; for here being no estate, there could be no election, and A. proposing to waive any benefit under the commission; his lordship said it ought to be accepted; and refused to discharge B. Wms's Rep. 560. Trin. 1719. Ex parte Salkeld.

7. Such creditors of a bankrupt as come in under the commission, by which all the bankrupt's estate, both real and personal (by means whereof he should pay his debts) was seised, shall not be allowed to imprison the bankrupt for not paying those debts. Per Ld. C. Parker, who said he would order his discharge out of custody, as to any action brought by those, who had come into the commission of bankruptcy, and had sought relief thereby. And though it was objected that he ought not to be discharged, till he had perfected his examination, yet the Court held the contrary; for it did not appear that he had been in contempt or refused; but if he had, yet when the commission was irregularly sued out, there ought not to be any proceedings upon it by way of examining the bankrupt or otherwise. Wms's Rep. 612. Hill. 1719. Ex parte James.

8. A creditor petitioned the Ld. C. Parker against the allowance of the bankrupt's certificate, who in consideration of the plaintiff's withdrawing his petition gave him a bond for the whole debt. The certificate was afterwards allowed, and the creditor sued the bond

against the bankrupt, who pleaded the act of 5 Geo. 2. and that the bond was obtained in order to procure his discharge; but Ld. C. Parker refused to relieve the bankrupt, and dismissed his bill with costs. Wms's Rep. 620. Pasch. 1720. *Lewis v. Chase*.

9. A question was, concerning the *form of certificates* on the late act. But per Ld. C. Parker, the commissioners are to certify one day, that the bankrupt has in all things conformed, &c. And then the next day, the creditors certify on the same parchment their consent, at the foot of which the commissioners are to certify, that the creditors had consented according to the terms of the act. Trin. 6. Geo. Burdock's Case.

[133] 10. A bankrupt so found, was *sued for a debt on bond, before his certificate allowed*, but he had surrendered his effects and submitted to be examined, and his certificate not being allowed, he pleaded Non est factum, and judgment was given against him. He had afterwards a certificate allowed and confirmed. The obligee three or four years afterwards brought a *scire facias* upon the judgment, and the defendant pleaded the stat. 5 Anne; and that the cause of action accrued before his bankruptcy, and upon issue joined, it was found against the bankrupt, he (as was alleged) *not being able to get the commission, or a copy thereof, to produce at the trial*, and the plaintiff after had judgment. The plaintiff got an injunction, but the Master of the Rolls, upon hearing, dismissed it, as a *matter wholly at law*; but upon appeal, Ld. C. Macclesfield reversed the decree, but seemed to admit that were the case only *matter of mispleading* equity should not relieve, but upon the several circumstances of the case a perpetual injunction was granted. 2 Wms's Rep. 70. Trin. 1722. *Blackhall v. Combs*.

11. A creditor came in under the commission and proved his debt, and afterwards arrested the bankrupt, who now prayed to be discharged. Ld. C. King said, it has been the construction of equity upon statute of 1 Anne cap. 12. which discharges the bankrupt of his debts on a certificate by 4 fifths of his creditors, and allowed by the Chancellor, that where a trader becomes a bankrupt and any one of his creditors comes in before [under] the commission to prove his debt, *though with design only to oppose the bankrupt's certificate*, yet this is an election to take his remedy for his debt under the commission, and if pending that, the creditor sues and arrests the bankrupt, it is taken to be an oppression, and ordered the creditor, at his own expence, to discharge the bankrupt out of custody. 2 Wms's Rep. 394. Mich. 1726. Anon.

12. But if such creditor will waive any benefit under the statute, and stay a reasonable time, and there is an improbability of the bankrupt's being able to gain his certificate signed by 4 fifths in number and value of the creditors, or allowed by the Court; in such case if the creditor applies to the Court, declaring his consent to waive any right, or share of the bankrupt's estate under the commission, and praying that he may sue the bankrupt; Ld. C. King thought it reasonable for the Court to give leave to such creditor to proceed at law against the bankrupt for his debt. 2 Wms's Rep. 395. Mich. 1726. in an Anon. Case.

13. On

13. On a joint commission against two partners, the separate creditors though they have taken out separate commissions, shall yet be at liberty to come in to oppose the allowing of the certificate. 3 Wms's Rep. 23. Hill. 1729. Horsey's case.

14. Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate as their joint creditors, 3 Wms's Rep. 24. Hill. 1729. Horsey's case.

So on the other hand, if there be two partners and one of them be-

comes a bankrupt, and on a separate commission being sued out against him, his certificate is allowed, this does not only discharge the bankrupt, of what he owed separately, but also of what he owed jointly, and on the partnership account, because by the act of parliament the bankrupt, upon making a full discovery, and obtaining his certificate, is to be discharged of all debts. Now as the debts he owes jointly with another, are equally his debts as what he owes on his separate account, consequently he is to be discharged of both his joint and separate debts; and so it has been determined by the judges of B. R. By the Lord Chancellor Parker, 3 Wms's Rep. 24. in a note circa 3 July, 1721. Ex parte Yale.

15. 5 Geo. 2. cap. 30, §. 10. No discovery shall intitle such bankrupt to the benefits allowed by this act, unless the commissioners, or the major part of them, shall under their hands and seals certify to the Lord Chancellor, that such bankrupt has made a full discovery of his estate, and in all things conformed himself according to the directions of this act, and that there does not appear to them any reason to doubt of the truth of such discovery, and unless four parts in five in number and value of the creditors, who shall be creditors for not less than 20l. respectively, or some other person by them duly authorized, shall sign such certificate; but the commissioners shall not certify till they shall have proof by affidavit, or affirmation in writing, of such creditors, or of the persons by them authorized, signing the certificate, and of the power by which any person shall be authorized to sign for any creditor, (which affidavit or affirmation, together with such authority to sign, shall be laid before the Lord Chancellor, with the said certificate) and unless such bankrupt make oath, or solemnly affirm in writing, that such certificate was obtained without fraud; and unless such certificate shall, after such affidavit or affirmation, be allowed by the Lord Chancellor, or by such two of the justices of B. R. C. B. or Barons of the Exchequer, to whom the consideration of such certificate shall be referred by the Lord Chancellor; and any of the creditors of such bankrupt are to be heard, if they think fit, against the making such certificate, and against the confirmation thereof.

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16. §. 13. If any bankrupt who shall have obtained his certificate, shall be taken in execution, or detained in prison, on account of any debts owing before he became bankrupt, by reason that judgment was obtained before such certificate was allowed; it shall be lawful for any one of the judges of the court, wherein judgment has been so obtained, on such bankrupt's producing his certificate allowed, to order any sheriff or gaoler, who shall have such bankrupt in his custody, to discharge such bankrupt without fee.

17. Where a bankrupt is in execution before the commission, and the creditor comes in and receives a dividend out of the estate, the court will put him to his election either to discharge the bankrupt

or

or renounce the dividend, and this in conformity to the law, where if the creditor will take the debtor in execution, he cannot afterwards take execution by *fi. fa.* because the body is deemed a satisfaction; but otherwise, if creditor takes a *fi. fa.* first and levies short, &c. there he may take a *ca. fa.* afterwards and sue both. And here A. sued out a commission of bankruptcy against B. 1726, and after in 1727, received a dividend of 2s. 6d. in the pound, and now lately took B. in execution for the rest of his debt, and now B. petitioned to be discharged, but was denied; per Ld. Chancellor. MS. Rep. Mich. Vacat. 1733. Ex parte Blewin.

18. Per Ld. Chancellor. Though a creditor of bankrupt under 20l. is by the last act excluded from assent or dissent to the certificate, yet as he is affected by the consequence of allowing the certificate, he hath right to petition, and shew any fraud against allowing the certificate. MS. Rep. Mich. 1734. Ex parte Allen.

19. Bankrupt in prison on a mesne process at suit of A. prayed that A. might make election, whether he would come in under commission, or take his remedy at law. Per Ld. Chancellor, A. may make a special election, to take his remedy at law, and to come in under the commission, so far as to prove his debt and assent or dissent to certificate, because that will affect his remedy at law, but he is to waive any dividend or further benefit under the commission, and accordingly A. made his election in this case. MS. Rep. Mich. 1734. Ex parte Holey.

20. F. having proved a debt of 2000l. under commission of bankruptcy against one L.—and paid contribution, and yet had L. in execution for his debt.—An order was made by the late Lord Chancellor, that F. should either discharge L. or lose his dividend.—And commissioners having certified that 4 fifths in number and value of creditors had consented to L's discharge exclusive of F. he now petitioned against allowing of certificate, and that he might be admitted to come in, so far under commission as to have liberty to assent or dissent. Lord Chancellor said, that it was settled on great debate, that a creditor might be at liberty to elect to proceed at law, and notwithstanding have liberty to assent or dissent to certificate. The case of putting creditor to election is but modern in favour of bankrupt. But if that election is made in general terms, and in consequence the creditor is to be excluded from a liberty of dissenting to the certificate, the rest of the creditors are not only to take all the rest of the effects, but have it in their power, by allowing the certificate, to bar the other's debt, &c. So that permitting such creditor to assent or dissent to the certificate, is not to give him a benefit but to prevent his being hurt, and the last statute about bankrupts mentions 4 fifths of creditors who shall have proved their debts, and not who proved, &c. and sought relief, and it would be hard to put it in the power of a few small creditors, by consenting to the certificate, to preclude the other of his debt, and therefore as the Court by equitable construction puts a creditor to his election of abiding by his remedy at law on counting in to have his dividend under the commission, so by the same rule of equity, such creditor renouncing any benefit under
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the commission should not be hurt, therefore let F. be at liberty to make a special election. MS. Rep. Trin. Vac. 1734. Ex parte Fenwick.

(T. a) Discharge. How it affects a Joint Debtor who is not a Bankrupt.

1. 10 Annæ, cap. 15. **T**HE discharge of a bankrupt by virtue of the act 4 Annæ, or by any other act relating to bankrupts, from the debts by him owing at the time he became a bankrupt, shall not be intended to discharge or release any other person, who was partner in trade with the bankrupt at the time he became a bankrupt, or who stood jointly bound, or had made any joint contract with him for the same debt from which he was discharged; but notwithstanding such discharge, such partner shall stand chargeable.

(U. a) Gaoler, &c. Punishment.

1. **T**HE commissioners upon the statute of bankrupts committed the bankrupt to the custody of the sheriff of B. for refusing to be examined on interrogatories. The sheriffs let the bankrupt to go at large. An action of escape lies against them. Mo. 834, 835. pl. 1123. Trin. 12 Jac. The case of the Sheriffs of Bristol.

Roll. Rep. 47. pl. 16. Barns v. Cary, S. C. adjudged for the plaintiff

Bull. 236.

S. C. adjudged accordingly.

2. 5 Geo. 2. cap. 30. §. 19. The gaoler shall upon request of any creditor, having proved his debt, and producing a certificate thereof under the hands of the commissioners, (which the commissioners are to give gratis) produce such person so committed; and in case such gaoler shall refuse to shew such person so committed, and being in his actual custody at the time of such request, to such creditor requesting to see such person, such gaoler shall forfeit 100l. for the use of the creditors, to be recovered by action of debt, in the name of the creditor requesting such sight.

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(W. a) Proceedings, &c. of Commissioners to be recorded.

1. 5 Geo. 2. cap. 30. **U**PON petition of any person, the Lord Chancellor may order such commissions, depositions, proceedings, and certificates, to be entred of record; and in case of the death of the witnesses proving such bankruptcy, or in case the said commissions, or other things shall be lost, a copy of the record of such commissions or other things signed and attested

attested as herein is mentioned, may be given in evidence to prove such commissions, and bankruptcy or other things; and all certificates which have been allowed, or to be allowed and entered of record, or a true copy of every certificate, signed and attested as herein is mentioned, shall and may be given in evidence in any courts of record, and, without further proof, taken to be a bar and discharge against any action for any debt contracted before the issuing of such commission; unless any creditor of the person that has such certificate, shall prove that such certificate was fraudulently obtained.

2. And the Lord Chancellor shall appoint a place near the inn of court, where the matters aforesaid shall be entered of record, where all persons shall be at liberty to search, and the Lord Chancellor shall by writing appoint a proper person, who shall (by himself or deputy to be approved by the Lord Chancellor by writing) enter of record such commission and other things, and have the custody of the entries thereof; and also appoint such fee for his labour therein as the Lord Chancellor shall think reasonable, not exceeding what is usually paid in like cases; and the person so to be appointed, and his deputy, shall continue to enter of record all the matters aforesaid, and to have the custody of the same, so long as they shall behave themselves well; and shall not be removed but by order in writing under the hand of the Lord Chancellor, on good cause therein specified.

(X. a) Compositions between Creditors and Bankrupt; and Pleadings thereof.

[137] **F.** BEING a goldsmith in London, and being disabled, agreed with most of his creditors to assign over all his estate upon oath to several persons in trust for the payment of his debts, as far as his estate would pay, he having such allowance for himself and family as was agreed upon; and most of the creditors signed the said agreement; but some of the persons that signed, finding that F. had done some act of violation of the agreement, took out a commission of bankruptcy against the said F. and seised all the estate they could come by, and pretended that some of the creditors aforesaid, that signed the agreement, and that were not privy to the suing out the commission, had notice in due time, though they had neglected the same, and that it was seven months from the date of the commission before the commissioners assigned. And F. and other the persons concerned in the first agreement, and excluded by the commission of bankruptcy, being not comprized, as aforesaid, preferred their bill against the assignees of the commission of bankruptcy, to have the agreement performed, or at least to be admitted to an equal dividend with them. But this Court would give no relief therein; and the rather, for that it was made appear that F. had made a sale of some of the goods he assigned to the creditors; but dismissed the bill. Chan. Cases 18, 19. Hill. 24 and 25. Car. 2. Fuller & al'. v. Lance & al'.

2. Scire facias on a judgment, the defendant pleaded a *composition for 2s. in the pound; ita quod it be paid within five years after the major part of his creditors in number and value shall subscribe the same composition, and after the defendant should be discharged from imprisonment*; and upon a demurrer to this plea, Holt Ch. J. was of opinion, that a composition by virtue of the statute *must be final*, and such as will bind the defendant, and from which he cannot vary, that those words *ita quod*, in things executory (as in this case) make a condition precedent; but in estates executed, they make a condition subsequent, and so is Littleton to be understood. That the payment of 2s. per pound, being a condition precedent to this agreement, and wholly in the power and will of the defendant till it is paid, *it is therefore no compleat agreement, and consequently not within the statute*; and this case is the stronger against the defendant, because it does not appear by his plea that he was in prison, so that this condition precedent may be impossible to be performed, and consequently the agreement can never arise; it is true, it might have been otherwise, if 2s. in the pound had been agreed to be paid within the five years, in the nature of a defeasance to the agreement; for this statute operates as a defeasance. 3 Salk. 59. pl. 1. Pasch. 12 W. 3. in B. R. Feltham v. Cudworth.

7 Mod. 10. S.C. accordingly; and per omnes, all compositions by virtue of this act, work by way of defeasance, which, if not performed, the original debt arises, and judgment for the plaintiff.

3. An objection was made to a composition, for that *the agreement appeared to be only to, for, and with those creditors who were parties, and had signed the composition*; but this objection was disallowed, because *the statute makes this an agreement for the rest*. 3. Salk. 60. pl. 6. Trin. 11 W. 3. B. R. Ellis v. Ollave.

4. The statute of *two thirds in number and value was pleaded* in bar, and the defendant, to bring himself within the benefit of the statute, shews, *that he absconded at the time mentioned by the statute, but did not shew for what he absconded*; and for this the plaintiff had judgment on demurrer. 7 Mod. 83. Mich. 1 Annæ B. R. Greenway v. Freeman.

5. When one *pleads the statute of two thirds*, if he would take advantage of the clause of being in custody, he must shew it to have been on the 17th November; if of the clause of absconding, he must shew he absconded for debt at the time of the statute made. And Holt said, he took the statute to be a private law; for though it concerned a great many, yet it concerned a particular sort of people; and here the plaintiff had judgment, because the defendant did not shew in his plea, *that he had absconded at the time of the act made, but only said it was on the 17th of November*. 7 Mod. 96. Mich. 1 Annæ B. R. Nicholl's case.

(Y. a) Pleadings and Evidence:

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1. 1 Jac. 1. cap. 15. **I**f any action shall be brought against any commissioner, or other person, having authority under the commission for any matter, by force of the said statute

As to the case in Lutw. 274. that was in case of a declaration brought by the assignees, wherein a

short way of declaring hath been allowed upon the authority of a great number of precedents; but as to the other case in Lutw. 451. of a plea that was long before the statute of 5 Geo. 1. cap. 24. Par. 20. which * is express, that no commission shall issue, unless the creditors, who petition for a commission, are creditors in such sums as are mentioned for that purpose in that act, per Curiam. 2 Ld. Raym. Rep. 1548. Mich. 2 Geo. 2.

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13. In an action by assignees of commissioners of bankrupts; they need not *set out the proceedings* of the commission and commissioners at large. Arg. 2 Ld. Raym. Rep. 1548. cites Lutw. 274. [Hill. 12 W. 3.] LAWSON v. LAMB, and that in Lutw. 451. [SLAUGHTER v. PIERRPOINT.] It was held, that it need not appear in a plea of assignment by commissioners of bankrupts, that the bankrupt *was indebted in 100l.*

14. In debt the defendant pleaded in bar that the plaintiff was a grocer and indebted, and became a bankrupt; and that upon a commission taken out he was declared a bankrupt, and that the debt for which the action was brought against the defendant, was assigned to his creditors, &c. The plaintiff took issue that he did not become bankrupt. Lutw. 761. Trin. 1 Ann. Heyworth v. Haigh.

15. An action brought against a bankrupt, the defendant pleads the statute of bankrupts, (in which it is said, that the person, who does as the act directs, may plead the general issue,) and that he manifestly became a bankrupt before the day, &c. Holt Ch. J. said, this plea will not do; for when a statute gives a plea, it must be pleaded in the words of the statute. 11 Mod. 207. pl. 9. Hill. 7 Ann. B. R. Hull v. Holiday.

16. In action upon several promises brought by assignees of a commission of bankrupt, the declaration was, that in consideration the defendant was indebted to the bankrupt for goods sold and delivered, &c. he promised to pay the assignees. After verdict on non assumpsit, &c. it was moved in arrest of judgment, that the promise ought to have been made to bankrupt, sed non allocat. per Cur. for the debt being assigned to the plaintiff, that is a good consideration. There are two ways of declaring, 1st. As here upon express promise to the assignees. 2dly, Assignees may bring such action as the bankrupt; as he may have an indebitatus assumpsit, so may they. Et judic. pro quer. Pasch. 12 Ann. B. R. Fashion v. Dormet.

17. In an action brought by assignees under a commission of bankruptcy, against the executor of S. J. R. the plaintiff alleged, that the defendant promised to pay them, but did not, by means of which they brought this action; the defendant pleaded, that he never made such promise to the bankrupt, and upon that the plaintiff demurred. But the Court said, that if the defendant had by his plea denied the very words of the declaration in this point, the plaintiff would have been bound at the trial to have proved a promise actually made to themselves. They took issue to be exactly like the case of an executor, and accordingly gave judgment for the plaintiff. 2 Barnard. Rep. in B. R. Mich. 5 Geo. 2. Skinner v. Rebow.

the Debt

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18. *Debt for rent by G. against B. a bankrupt, and judgment before the certificate was allowed, so that he had no opportunity to plead it, and take the benefit of 4 Ann. But in the sci. fac. against the bail, the certificate was pleaded, and the plea over-ruled, so that the bankrupt had no relief but in equity, or by audita querela, which is an equitable remedy at law. But Cowper Chancellor denied an injunction, because this was a merciful law made in favour of the bankrupt, and in prejudice of creditors, and therefore not to be extended in equity further than at law. Mich. 3 Geo. Canc. Bagshall v. Gore.*

(Z. 2) Equity.

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1. **P**ROOF of a debt disallowed by commissioners of bankrupt, the Court will hear the proof. Chan. Cases 275. Pasch. 28. Car. 2. Anon.

2. Bill for relief against bonds, &c. given to the bankrupt, but suggested to be paid, and therefore prays to have them delivered up and cancelled; a creditor of the bankrupt's, to whom the bonds, &c. are assigned by the commissioners, must be made a party. Fin. Rep. 265. Mich. 28 Car. 2. Ford v. Lear and Key.

3. Bill by creditors against the assignees of a bankrupt to have a debt recovered by the assignees distributed among the creditors, without being paid into the hands of the assignees, as fearing, by payment of the assignees, their parts may be lost; decreed, to be distributed among the creditors and assignees, according to their several proportions, by the person against whom the recovery was, who was one of the plaintiffs in this cause, and a principal creditor. Fin. Rep. 264. Trin. 28 Car. 2. Hawkins & al' v. King & al'.

4. Bill for account and discovery of money received by defendant for one that became bankrupt; defendant pleaded, he received it only as menial servant to the bankrupt, and had accounted for it to him already, and that the commissioners had already examined him on interrogatories, the plea was over-ruled. Vern. 95. pl. 81. Mich. 1682. Wagstaff v. Bedford.

5. Bill for discovery of a bankrupt's estate; the defendant demurred, because the bankrupt was not made a party, and the demurrer was allowed. 2 Vern. 32. pl. 23. Hill. 1688. Sharpe v. Gamon.

3 Wms's Rep. 311. in a note of the reporter, he says that,

it is a general rule, that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree; thus, in a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party; by the Master of the Rolls, Hill. 1732. De Golla v. Ward. Though with regard to making the bankrupt a party, it seems formerly to have been held otherwise, and cites a Vern. 32.

6. Bankrupt is taken in execution pending the reference of his certificate to the judges, though it appears that the debt was discharged by the statute, yet the Court would not discharge him, but put him to his audita querela. 2 Vern. 697. in case of Goodwin; cites it as the case of Baily v. Robinson. Trin. 6 Anne in B. R.

Cui in Vita.

117. A bankrupt having *slipped his time of pleading his certificate* and *debet procedere* to the bankruptcy, is not to be relieved in equity; *land per Harcourt C.* the statute is binding in equity, as well as at law. 1 Vern. 696. Trin. 1743. *Goodwin's case* 1011. 1012. 8. 5 Geo. 2. cap. 30. §. 28. No suit in equity shall be commenced by assignees, without the consent of the major part in value of the creditors present at a meeting: pursuant to notice in the Gazette.

For more of creditor and bankrupt in general, see other proper titles.

[142] Cui in Vita.

(A) Who shall have it, and in what Cases.

1. *Westm. 2. 13 E. 1. cap. 13.* **G**IVES a Cui in Vita to the wife for recovery of her land lost by the husband's default in his life time.

2. Recovery by *survivorship* is alienation, and therefore the feme shall have Cui in Vita, after the death of her husband, of a recovery she suffered. Br. Cui in Vita, pl. 19, cites 4 E. 3. 1. 108.

3. If judgment of *forejudging* be given against *baron and feme*, this is no void but error, and the feme shall not have Cui in Vita. Br. Cui in Vita, pl. 14, cites 9 E. 3. 2.

4. In assise if a man *leases to baron and feme for life*, and the baron *alien in fee*, the *lessee may enter* and recover by assise if he be *grieved*, notwithstanding that the feme may have Cui in Vita, after the death of her husband. And so see that she may have Cui in Vita notwithstanding the alienation, and the entry; for the title of entry is not given but by the law, for the alienation and the title of the feme is by the demise before notice. Br. Cui in Vita, pl. 9, cites 11 Aff. 11.

5. A *sur Cui in Vita* is maintainable of a *rent*. *E. N. B. 104* (F) cites Mich. 12 E. 3.

6. The heir of the feme shall have Cui in Vita and not assise, Br. Entre Congr. pl. 28, cites 21 E. 3. 6.

7. In assise the baron and feme were *seised in fee*, and the baron *infeoffed E. in fee*, but the feme held her *in claiming her first estate*, and the baron by *license and will of E.* the *feoffee*, *re-entered and took the profits*, and after *E. died*, his daughter and heir being in the *seignior* of his feme mother to the daughter, and after the baron died, and the feme claimed by her first interest, and continued

hundred post mortem viri by ten years, and the plaintiff in assise entered because the feme was his wife, and the daughter of E. the feoffee, was born and entered, and well, by award, and the lord of the mief brought assise against the daughter and heir of E. the feoffee, and was barred, quod nota; for the feoffment of the baron was a discontinuance, so that the entry of the feme was not lawful; but she put to her Cui in Vita. Br. Entre Cong. pl. 56. cites 21 Aff. 25.

8. It appears by judgment in assise, that where baron and feme are tenants for life, the remainder to A. in tail, and the baron aliens in tail, and A. has issue and dies, the issue may enter for the alienation to his disinherittance notwithstanding that the feme covert be alive; for she shall have Cui in Vita after the death of her baron. Br. Cui in Vita, pl. 10. cites 43 Aff. 17.

9. Sur Cui in Vita was brought by the heir against W. D. into which the same W. had not entry, unless after the demise, which the aforesaid W. (whom she in his life could not contradict) made thereof to J. of D. and the writ awarded good, upon the alienation made by the tenant himself; for if he makes discontinuance, and after divers degrees, repurchases the land again, the writ is well brought as above, and the writ awarded good, notwithstanding that it appeared that all was one and the same person. Br. Entre in le per. pl. 3. cites 44 E. 3, 4, 5.

Br. Cui in Vita, pl. 23. cites 3. C.

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10. Baron, and feme and a third are seized in fee, the baron alien'd and died; Cui in Vita does not lie for the feme; for she and the third may join in writ of right. Br. Extinguishment, pl. 43. cites 35 Aff. 15. and Fitzh. Cui in Vita, 20.

F. N. B. 193. (K) S. P. but says it seems, that she shall

have a Cui in Vita of a moiety, being the third jointenant, but that such alienation seems to be a frustration of the jointure, and refers to Falsch. 16, E. 2. Cui in Vita in the abridgment.

11. But if the third dies, she may have Cui in Vita of all, and the action suspended is now revived; but in fems it was never suspended, for it was not given to her till after the death of the third. Ibid.

12. If a man is seized in jure uxoris, and W. returns against him by default; and the baron dies, the feme shall have Cui in Vita, and not quod ei de forceat; per Mayle J. quod non negatur. Br. Cui in Vita, pl. 12. cites 2 E. 4. 23.

F. N. B. 193. (I) S. P. a Inst. 343. S. P. for this is as it for she cannot have a quod ei de forceat.

were a demise made by the husband; for otherwise she should be without remedy; not have a quod ei de forceat.

13. If the husband discontinues the land of the wife, and she brings a writ of dower, she is concluded to have a Cui in Vita; per Walmesley J. Ow. 154. cites 10 E. 4.

By acceptance of parcel of the land in dower she

shall be barred in Cui in Vita of the residue. F. N. B. 194. (B)

14. If baron and feme are impleaded by him, who has good title, and the baron causes the action, the feme has no remedy. But by the statute of Westminster 2. cap. 3. upon the tender of the baron the feme may be received; but where the baron and feme

M. 2 are

are received in default of the tenant for life by reversion in *jure uxoris*, there the *parson* cannot *convey* the action; for he is received to defend the right of his wife. Br. Cui in Vita, pl. 23. cites 7 E. 4. 17.

15. If recovery is had by default in a writ of *wast*, the feme after the death, of her husband shall not have Cui in Vita. Quære whether because it is not merely by default, or because no land is in demand by the writ of *wast*, or if she shall have quod ei *desorcean* upon such recovery? Br. Cui in Vita, pl. 22. cites 9 E. 4. 16.

16. The writ of Cui in Vita lies, where the husband alien¹ in fee the right of inheritance of his wife, or the *freehold* of his wife by feoffment, or grants for life, or in tail; then after the death of the husband, the wife shall have Cui in Vita *contradictor non potuit*; and the writ lies where the wife has an estate for life or in tail, and the husband alien² that estate and *title* of the wife's, then the wife after his death shall have that writ. F. N. B. 193. (A).

17. And if the wife does not bring the writ during her life, then, if she had an estate in fee simple, *per heir* shall have a writ, which is called *Sur Cui in Vita* after her death. And if the wife have an estate in tail, and her husband alien³, and makes a feoffment of that estate, then if the wife dies, her heir shall have a writ of *formedon* in the descender to recover that estate, and not a writ of *Sur Cui in Vita*; for those writs of *Cui in Vita*, and *Sur Cui in Vita*, are writs founded upon the common law, of an estate in fee simple; for there was no other estate at the common law, which would descend, but a fee simple. F. N. B. 193. (A).

18. If the husband and wife exchange the land of the wife for other lands, if the wife agreed unto the exchange after the husband's death, she shall not have a Cui in Vita. F. N. B. 194. (A).

19. The husband gave the land of the wife to *J. who gave other land to the husband and wife, and to her son of the husband, and to the heirs of him who survived*, and that was pleaded by exchange in bar, in a Cui in Vita and holden in bar. F. N. B. 194. (B), in the notes in the English edition, cites 8 E. 2. Cui in Vita, 38. and 20 E. 3. Cui in Vita 10.

20. So if she accepts a rent where she and her husband make a feoffment. F. N. B. 194 (B) *ibid.* cites 21 H. 6. 24.

21. The aunt and the niece may join in a writ of *Sur Cui in Vita*, upon an alienation made by the husband, their common ancestor; or upon a recovery had against the husband and wife, who was the common ancestor to them, if the second husband alien⁴ the lands of the wife, and he and his wife die, and the issue of the wife and the first husband shall have a *Sur Cui in Vita* against the alienor, although the second husband be living, if he were not intitled to be tenant by the curtesy; but if the second husband be intitled to be tenant by the curtesy, then the issue of the first husband shall not have a *Sur Cui in Vita* during the life of the second husband. F. N. B. 194. (D).

22. Two barons of *femes jointenants* alien jointly and die, their *femes* survivors shall have several Cui in Vita's; because the coverture is the cause of the action, the which is several; for the coverture of the one, is not the coverture of the other. Keilw. 105. b. pl. 18. *Casus incerti Temporis*. Anon.

S. C. cited
Arg. Roll.
Rep. 44a.

23. If baron seized of a *copyhold* in right of his wife surrender this to the use of a stranger, the wife cannot enter after the death of the baron; for copyhold is out of 32 H. 8. For this is intended of freehold, but he ought to make his plaint in nature of a Cui in Vita. Dal. 116. pl. 8. Anno 16 Eliz. Anon.

24. Husband aliened the lands of the wife and afterwards they are divorced and the husband dies; the wife shall not enter by the 32 H. 8. but is put to her Cui in Vita ante divortium. Le. 7. in pl. 10. Mich. 25 and 26 Eliz. B. R. Egerton Sol' Gen' cites it as Haddon's case.

25. If lands, during the coverture, are given to the husband and wife and their heirs, this is *jus uxoris* within the statute Westm. 2 cap. 43. 2 Inst. 343.

(B) Writ and Pleadings.

1. **I**N Cui in Vita of land *quam clamat esse jus, &c. de dono Will' & Georgii, &c.* The tenant said, that the demandant had never anything of the gift of Will' &c. And held a good plea to the writ. Thel. Dig. 170. Lib. 11. cap. 52. S. 5. cites Trin. 4 E. 2. Brief: 795.

2. In Cui in Vita of land *quam clamat, &c. de dono Will' qui Hug. quondam virum suum & ipsam inde feoffavit, &c.* The tenant said, that the baron never had any thing but as baron of the feme, &c. And it was held no plea. Thel. Dig. 170. Lib. 11. cap. 52. S. 6. cites Pasch. 5 E. 2. Br: 799.

3. Cui in Vita supposing that the tenant had not entry unless by [115] S. to whom her baron leased; the tenant said, that the baron leased to S. and to Agnes his feme, judgment of the writ. And held no plea. Thel. Dig. 170. Lib. 11. cap. 52. S. 4. cites Mich. 19 E. 2. Brief 843.

4. In Cui in Vita the tenant pleaded jointenancy by fine with one A. and the demandant said, that the tenant had released all his rights to A. and so the tenant is sole tenant, and yet the writ was abated. Thel. Dig. 226. Lib. 16. cap. 7. S. 7. cites 3 E. 3. It. North. Maint' de Br. 13.

5. In Cui in Vita of a manor given in tail, if the tenant pleads non tenure of parcel, it is sufficient for the demandant to maintain, that the tenant was tenant of the manor as intirely as the manor was at the time of the gift in tail. Thel. Dig. 226. Lib. 16. cap. 7. S. 10. cites Trin. 4 E. 3. 144. 163. and says, see 4 E. 3. 122. 9 E. 3. 489. and 20 E. 3. Maint' de Br. 10 in Formedon.

6. In Cui in Vita of a manor, the tenant pleaded non tenure of parcel, and the demandant said, that the tenant is tenant intirely

of the manor in demesne as in demesne, in service as in service, &c., and was not received, by which the said fully tenant of the manor according as she demands it, and the others e contra. Thel. Dig. 226. Lib. 16. cap. 7. S. 14. cites Mich. 5 E. 3. 207.

7. In Cui in Vita issue may be taken upon the demise supposed to be made by the baron. Thel. Dig. 171. Lib. 11. cap. 52. S. 13. cites Pasch. 8 E. 3. 392.

8. The writ of Cui in Vita is good enough, without saying in certain what estate the demandant has by her title. Thel. Dig. 106. Lib. 10. cap. 14. S. 15. cites Pasch. 8 E. 3. 392.

Note, if the writ be in the degrees, the words Cui in Vita, &c. are put in the end; but if in the post. in the

middle; and therefore, if the writ be post dimissionem quam, &c. vir ipsius B. inde fecit cui ipsa, &c. the writ shall abate; for the words relate to the next antecedent. F. N. B. 193. (E) in the new notes, there (c) cites 16 E. 3. Brief 65a.

10. In Cui in Vita, it is a good plea to say, that the demandant had accepted part of the same land for her dower. Br. Execution, pl. 57. cites E. 3. 39.

11. Cui in Vita against Tho. and Will. & A. his feme, who had not entry unless by the baron of the demandant. Tho. disclaimed, and the baron and feme took the intire tenancy, and said, that they entered by Tho. and not by her baron, but they were compelled to answer to the lease supposed by the writ, by which they said as above absque hoc, that the baron leased to them 3 modo & forma, &c. and issue thereupon, and held, that it went to the action. Thel. Dig. 176. Lib. 11. cap. 54. S. 38. cites Mich. 29 E. 3. 60.

Br. Ber. pl. 108. cites S. C. — Br. Garran- ties, pl. 29. cites S. C.

12. In Cui in Vita the case was, that the baron seized in jure uxoris, gave the land to baron and feme in special tail, the remainder to T. in tail, saving the reversion to him and his heirs; the baron had issue by his feme; the baron and feme died, and the issue brought Cui in Vita against the tenant, and they pleaded this matter in bar by this gift, saying the reversion to the baron and his heirs, and shewed deed of it without warranty, and averred, that assets is descended in fee to the heir, who is demandant, by the same father, and so pleaded the reversion for his warranty and the assets in bar, and the demandant demurred, and because the demandant by this suit is to defeat the same reversion and warranty, therefore by [146] award the demandant recovered; for a man shall not be bound by this thing which he is to defeat by his suit, quod nota. Br. Cui in Vita, pl. 6. cites 38 E. 3. 32.

13. In Cui in Vita a man seized in jure uxoris discontinued, and after several alienations, he re-purchased; the feme died, and the heir brought Sur Cui in Vita against him by name of W. B. quod reddat, &c. & in quod non habeat ingressum nisi post dimissionem, quam idem W. B. fecit, &c. cui ipsa, the feme, contradicere non potuit, and exception was taken to the writ, inasmuch as it should be

be by a strange name, & non allocatur, but the writ awarded good. Quod nota. Br. Cui in Vita. pl. 24. cites 44 E. 3. 4. 5.

14. Cui in Vita against B. in quæ idem B. non habet ingressum nisi post dimissionem quam prædictus B. cui ipsa, &c. inde fecit Jo. D. &c. adjudged a good writ, notwithstanding that it appears by the writ, that the tenant is the same person who made the lease, without giving diverse names; for divers mesne feoffments may be made between the demise and the re-purchase. Thel. Dig. 877. Lib. 11. cap. 54. §. 41. cites Hill. 44 E. 3. 4. And says, it seems that the writ was a *Sur Cui in Vita*.

15. Cui in Vita, which she claims to hold to her and the heirs of her body issuing, and did not shew of whose gift, and therefore the tenant pleaded it to the writ, and it was abated by award, quod non contradicatur ibidem, that in quod ei de forceat, he need not shew of whose gift. Note the diversity. Br. Cui in Vita. pl. 2. cites 48 E. 3. 8.

16. Cui in Vita which she claims to hold to her and the heirs of her body of the gift of W. N. The tenant said, that she never had any thing of the gift of W. N. Priſt. And per Belknap, clearly this is no answer; for if she has of the gift of one, or another if the baron aliens, she shall have action, and the writ shall say *Quam clamat esse jus & hereditatem suam*, notwithstanding that it be of a purchase, and therefore every word in a writ is not traversable. Br. Cui in Vita. pl. 3. cites 49 E. 3. 29.

17. In Cui in Vita which she claims to hold to her and the heirs of her body of the gift of J. N. the gift is not traversable, but the alienation. Br. Traverse per, &c. pl. 43. cites 49 E. 3. 32.

18. So if it be which she claims to her right and inheritance, where it is of a purchase, this is not traversable. Br. Traverse per, &c. pl. 43. cites 49 E. 3. 32.

19. The tenant shall have traverse to the title of the demandant in Cui in Vita. Thel. Dig. 150. Lib. 10. cap. 14. §. 4. cites 49 E. 3. 22. and Hill. 50. E. 3. 6.

20. In Cui in Vita of the demise of the baron of land, which she held for term of life of the demise of J. N. and the tenant said, that she had nothing of the demise of J. N. and admitted a good answer. Per Cur. upon argument of it; for where she makes title, this title ought to be a true title, and there fine upon release made to baron and feme, and to the heirs of the baron by J. N. was taken up demise; for it is supposed by it, that the baron and feme were in possession at the time of the fine. Br. Cui in Vita, pl. 4. cites 50 E. 3. 6.

21. In Cui in Vita, where four are impleaded, three confess or make default, and the fourth demands the view, the demandant shall have judgment of three parts immediately, contra where the fourth takes upon him the intire tenancy. Br. Judgment, pl. 22. cites 12 H. 4. 19.

22. And if the fourth is tenant of the whole, and does not take upon him the intire tenancy, but demands the view, and he is ousted of three parts by execution upon a judgment against the other three,

direct, he shall have assise. Br. Judgment, pl. 22. cites 12 H. 4. 19.

23. In cases special, the writ shall make mention of whose gift, lease, or demise, he holds, *contra of fee simple*; for of estate for term of life the writ shall say, *Quam clamat tenere ad terminum vite ex dimissione* &c. N. And of estate tail, *Quam clamat tenere sibi & hæredibus de corpore suo exeuntibus de dono* &c. N. and of fee simple, *Quod clamat esse suum jus*, or *jus & hæreditatem suam*, without saying of whose gift or feoffment; per Prisot; and so was the best opinion, which is not much denied. Br. Cui in Vita, pl. 7. cites 39 H. 6. 38.

24. If the baron aliens the land of his feme with warranty, and leaves assents descended in fee, and he and the feme die, and the heir aliens the assents, and dies, his heir shall be barred in Cui in Vita, by reason that assents were descended to his father, because it was of fee simple; *contra of the heir in tail*, who aliens such assents and dies, his issue shall not be barred. Br. Cui in Vita, pl. 18. cites Ver. N. B. Formedon in descender.

25. The writ of Cui in Vita may be in the Per, Cui, and Post. F. N. B. 193. (E).

26. In a Cui in Vita, the grant, or gift, alleged in the writ, is not traversable. F. N. B. 194. (G).

27. If a man gives lands to a woman to marry her, and they marry, and afterwards the husband aliens and dies, the wife shall have Cui in Vita. F. N. B. 194. (H).

(C) Recovered. What.

S. P. the purchase being during the coverture. F. N. B. 194. (B)

1. **ENTRY** sur Disseisin per Cur. Where the baron and feme purchases land, and the baron aliens and dies, the feme may have Cui in Vita and recover the whole; for there are no moieties between the baron and the feme during the coverture, and therefore it is not good for any moiety. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45.

F. N. B. 194. (B) S. P. accordingly.

2. But if they purchase before the coverture, and after intermarry, and the baron aliens all and dies, the feme shall have Cui in Vita of the moiety and recover it, and the alienation is good of the other moiety; note the diversity; for it appears. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45.

Cro. F. 234. pl. 7. Patch. 33 Eliz. C. b. Hayes v. Allen, S. C. adjudged, and judgment affirmed in error. — Le. 158. pl. 210. S. C. and the writ awarded good. — And. 265. pl. 272. S. C. adjudged accordingly.

3. An husband seised in right of his wife, and having in his own right, lands contiguous to his wife's land, builds an house which extends 20 feet northward, and 12 feet eastward upon his wife's land, the rest of the house standing upon the husband's ground; the wife dies without any issue had by her husband; the heir of the wife brings a [Sur] Cui in Vita against the husband, and demands the same land by the name of an house, and had judgment pro tanto, as aforesaid; affirmed in error. Jenk. 268. pl. 83.

Page. 43. S. C. and the judgment affirmed. — [The federal reports are of the building being by discontinuance of the husband upon part of the discontinuance's own land, and part on the wife's land.]

For more as to Cui in Vita, see the statute of Westm. 2. 13 E. 1. cap. 40. at tit. Regt. (1) pl. 9. &c. and other proper titles.



(A) Tenant by the Curtsey. Of what Seisin. Actual or not.

1. **Q**UARE impedit by the King against diverse, the defendant made title that the advowson descended to three coparceners, who made partition to present by turn, and that the eldest had her turn, and after the second her turn, and he married the youngest and had issue by her, and she died, the church voided, so it belonged to him to present, and did not allege that his feme ever presented, so as she had possession in fact, and yet admitted that he may be tenant by the curtesy by the seisin of the others. Br. Tenant per le Curtesie, pl. 2. cites 21 E. 3. 31.

could by no industry attain to any other seisin. Et impotentia excludit legem. — A man shall be tenant by the curtesy of an advowson, of which the wife had the inheritance, though it never avoided in her time. Dod. of Advowson. 21 — F. N. B. 149. (D) S. P. — Rep. 97. b. Arg. S. P. and says, the rule of law is so, and cites 7. E. 3. 66. a. b. and 3 H. 7. 5. a. — The baron shall be tenant by the curtesy of an advowson, though the feme never presented. Br. Tenant per le Curtesie, pl. 9. cites 7 E. 3. 66. and Finch. Tit. Barro 298. — And notwithstanding the advowson becomes void during the coverture, and the wife dies after the six months past, and before any presentment made by the husband, &c. so as the ordinary presents for lapse to this avoidance, yet the husband shall present to the next avoidance, as tenant by the curtesy, &c. Perk. cap. 6. S. 468.

a. Affise by N. against A. it was found by verdict at large, that S. was seised of the land, and had issue R. before espousals, and A. within the espousals by her baron and died seised, R. and A. entered and made purparty of this land and others, so that this land was allotted to R. who took to baron the plaintiff in the affise and had issue, and R. died, and the baron held him in as tenant by the curtesy, and A. ousted him, and he brought affise and judgment given for the plaintiff; for this entry and purparty, and dying seised, made the bastard to be heir; quod nota. Br. Entre Cong. pl. 31. cites 21 E. 3. 34.

2. Land is given to W. and A. his feme in special tail, the remainder to J. N. in tail, the remainder to the right heirs of J. N. The Br. Tenant per le Curtesie, pl. 4.

and S. C. The baron died without issue, and the feme survived, and he was tenant in tail after possibility of issue extinct, and took another baron and had issue, and after J. N. died without issue, to whom the feme is heir, and after A. died. The second baron shall be tenant by the curtesy; for when the remainder in fee came to the feme tenant in tail after possibility of issue, &c. the first remainder was extinct in the fee, and so A. was seized in fee. Br. Estates, pl. 25. cites 9 E. 4. 17. 18.

Co. Litt. 29. 4. It was touched, that if a feme has rent and takes baron, and she dies before a day of payment or other feisin, yet the baron shall be tenant by the curtesy. Br. Tenant per le Curtesy, pl. 5. cites 3 H. 7. 5.
Arg. S. P. and says, it is a rule in law, and cited by Z. 3. 66. a. b. and 3 H. 7. 5. a.

[149] 5. A man shall not be tenant by the curtesy, unless upon feisin feme shall be endowed in fact. Br. Tenant per le Curtesy, pl. 7. cites F. N. B.

of a feisin and possession in law, without feisin in deed; as where the father of the baron died seized, and before after died before entry; quod nota; for otherwise it is of tenant by the curtesy, and the reason seems to be, in as much as the baron may enter in jure uxoris, but the feme cannot compel her baron to enter into his own land. Br. Dower, pl. 75. cites 21 E. 4. 68.

A woman shall not be tenant by the curtesy of a bare right, title, use, or of a reversion or remainder expectant upon any estate of freehold, unless the particular estate determined or ended during the coverture. Co. Litt. 29. p.

But there must be a feisin in deed if it may be obtained unto; as if a man dies seized of lands in fee simple, or fee tail general, and these lands descend to his daughter, and she takes a husband, and has issue, and dies before any entry, the husband shall not be tenant by the curtesy, and yet in this case she had a feisin in law, but if she or her husband had, during her life, entered, he should have been tenant by the curtesy. Co. Litt. 29. a.

6. If father and daughter be, and the daughter takes baron and has issue by him, and after the issue dies, and the father of the feme dies, the baron and feme enter, and after the feme dies the baron shall be tenant by the curtesy, quære; for the issue died before the land was descended to his mother. Br. Tenant per le Curtesy, pl. 12. cites lib. Parkins tit. Tenant per le Curtesy.

7. If father and daughter be, the father dies, the daughter enters and takes baron and has issue, and after a son is born, who enters upon the baron and feme, and after the issue of the daughter dies, and the son, who was brother to the daughter, dies without issue, the baron shall not be tenant by the curtesy, if he does not enter again in the life of the feme. But quære if he shall be tenant by the curtesy, if he had entered in the life of the feme? Br. Tenant per le Curtesy, pl. 13.

8. If a man seized of lands in fee has issue a daughter, who takes husband and has issue, and the father dies, and the husband enters; he shall be tenant by the curtesy, albeit the issue was had before the wife was seized. And so it is albeit the issue had died in the life time of her father before any descent of the land, yet shall he be tenant by the curtesy. Co. Litt. 29. a.

9. If after issue land descends to the wife (be the issue dead or alive at the time of the descent) he shall be tenant by the curtesy. For the time of the birth of the issue is not material, if he be born alive

alive and in the life of the wife. 8 Rep. 35. b. Trin. 29 Eliz. the issue the wife par-
C. B. Paine's Case. chases lands

in fee, and dies without any other issue, the baron shall be tenant by the curtesy; for the having issue, and the being seised during the coverture, is sufficient, though it be at several times.

10. Custom of a manor, that if a man marries a customary tenant of the said manor, and has issue, and shall over-live his wife, he shall be tenant by the curtesy. During the coverture, a customary tenement descends, he has issue; yet he shall not be tenant by the curtesy, because the wife was not customary tenant at the time of marriage. 2 Le. 109. pl. 140. Trin. 29 Eliz. B. R. Sir J. Savage's Case.

of Clement v. Scudamore, Hill. 2 Ann. B. R. — And by Holt and Powell, a Ld. Raym. Rep. 1028. in S. C. — And so in S. C. Wms's Rep. 69.

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11. A. died, leaving a wife, a son, and a daughter; the widow entered upon the estate, and was seised as tenant in dower of one part, and as tenant in common with her son of another part, and of a third part as guardian in socage to her son. The son went beyond sea, and died under age, whereby the daughter became intitled; who during her infancy married the plaintiff, and together with him applied to the mother to be let into possession of the son's part, which the mother refused, imagining the son was still alive, and thereupon to hold the land for him. Upon this they brought a bill in Chancery for an account, which was accordingly directed; after this the daughter died, and upon further application to the Court by the husband, one question was, whether the seisin of the mother (after the son's death) being tenant in common with the daughter, was the seisin of the daughter sufficient to make the husband tenant by the curtesy of her part. And the Ld. Chancellor held it was sufficient, for the entry and possession of one tenant in common, &c. is the entry and possession of the other; and accordingly he decreed for the plaintiff. 25 Feb. 1739. Sterling v. Pennington.

ing possession of the whole against the daughter and her husband, was intirely owing to a mistake in imagining her son was still living, and not with an intent to exclude the daughter from her right, and therefore no inference can be drawn from it.

(B) In what Cases. In Respect of the Issue.

1. A FEME inheritable took baron and had issue, the baron died, and she took another baron and had issue, which died, and the same died, the second baron shall be tenant by the curtesy. Br. Tenant per le Curtesy, pl. 8. cites 21 H. 3. and Fitzh. Dower. 128.

2. A man may be tenant by curtesy, though the child never be heard to cry, if it move and be alive; because it may be born dumb. Per Fitzherbert. D. 25. pl. 159. a. b. Hill. 28 H. 8. Anon.

67. Hill. 28 H. 3. S. P. in C. B. — Co. Lit. 29. b. ad finem, 3. B.

3. If

Fin. 8vo. 129. S. P. — Co. Lit. 29. a. S. P. — And 25. pl. 159. b. ad finem, 3. B.

3. If the *baron* has issue by the *feme*, and the *feme* dies, the baron shall be tenant by the curtesy; be the issue dead or alive, Br. Tenant by the Curtesy. pl. 11. cites Old Tenures tit. Tenant per le Curtesy.

6. P. and it ought to be born in the life of the wife. Co. Lit. 29. b. 20. a.

4. The wife died big with child and was ripped alive out of her belly, the husband shan't be tenant by the curtesy; for it ought to commence by the issue and be consummate by the death of the wife, and the estate of tenant by the curtesy ought to take away the immediate descent. 8 Rep. 35. a. cited per Cur, as Reppes's Case.

5. If the issue be born deaf or dumb, or both, or be born an idiot, yet it is a lawful issue to make the husband tenant by the curtesy and to inherit the land. Co. Lit. 29. a.

(C) Tenant by the Curtesy. In what Cases. In Respect of the Limitation of the Estate.

1. IF a daughter be heir and endows her mother, and takes a baron and has issue, and dies, and the mother dies, the baron of the daughter after his feme, if she dies in the life of the mother, shall not be tenant by the curtesy; for the possession of his feme was defeated and turned into reversion; Br. Tenant per le Curtesy. pl. 10. cites 8 Aff. 6.

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Dr. Trop.
per. pl. 4.
Case S. C.
cited by
Anderton
Ch. J. Le.
2d. pl. 102.
Rich. 2d. 2.
per Eliz.
C. B. Intake
of Louch v.
Bainfield.

2. A man seized of land took feme, and he and his feme levied a fine and took an estate to them, and to the heirs of their two bodies begotten, and had issue a daughter E. and died. E. took baron, and she and her baron levied a fine of the same land, and retook to them and to the heirs of their two bodies, the remainder over in fee, and had issue within age (the land held by chivalry;) the baron died; E. took another baron and had issue, and E. died; the first issue within age and the lord entered into the land by the ward of the first issue of E. by her first baron, and the second baron of E. entered pretending to be tenant by the curtesy, because, by his pretence, his feme was remitted to the first tail by the fine levied by the father and mother of his feme, which is general to his feme, and so every issue inheritable, and so be tenant by the curtesy. But the best opinion was, because his feme and the first baron levied the fine, and retook but an estate to them in special tail, therefore the second baron cannot be tenant by the curtesy, because as his feme shall be estopped by the fine, so shall her baron be who claimed by her, &c. in ejectione custod'. Br. Tenant per le Curtesie; pl. 1. cites 46 E. 3. 5.

Godb. 85.
S. P. Arg.
cites 19 H.
7. 1.
Le. 135.
Arg. cites
9 H. 7. 1.

3. Husband makes discontinuance of his wife's land, and takes back estate to him and his wife by which his wife is remitted; they have issue; the wife dies; husband shall not be tenant by the curtesy; for he has extinguished his future right by the livery. Arg. 4 Le. 221. cites 9 H. 7. 1.

2d. 21. 20. in pl. 103. Trin. 3 Eliz. Arg. S. P. — If he makes a gift of his land, and the wife dies, he shall not be tenant by the curtesy, for his wife

tail to be tenant by the curtesy is extinct by the crossment. Co. Litt. 30. b. ———. P. by way of quare. Per Holt Ch. J. Carth. 67.

4. The baron of *feme tenant in tail* shall be tenant by the curtesy, though his feme and her issue die without issue. Br. Dower, pl. 86. cites Old Nat. Brev. 144. Co. Litt. 30. b. 3. P.

5. A. had issue a daughter, and *devised his lands to his executors for payment of his debts, and till his debts paid*, and made his executors, and died; and after the debts were paid. Resolved, in the beginning of Q. Elizabeth, that the daughter having married, and had issue, and the debts being afterwards paid, that the baron shall be tenant by the curtesy; cited in Matthew Manning's Case, 3 Rep. 96. as Guavarra's Case.

6. In all cases where a man takes a wife seised of such estate of tenement, so that the issue which he has by his wife may by possibility inherit the same of such estate as the wife had, as heir to the wife, in such case, after the death of the feme, he shall have the same lands by the curtesy of England, otherwise not, and issue born dead cannot by possibility inherit. 8 Rep. 34. b. Trin. 29 Eliz. C. B. Paine's Case.

7. A monster is not an issue, but human shape is sufficient, though there be some deformity. 8 Rep. 35. a. cites Bracton. Co. Litt. 29. b. S. P.

8. A. has a son and two daughters, and devised Black Acre, White Acre, and Green Acre, whereof he is seised in fee to his wife for life; remainder of Black Acre to his son and his heirs; remainder of White Acre to his eldest daughter and her heirs; remainder of Green Acre to his youngest daughter and her heirs; and if any of his three children die without issue of his or her bodies, then the other surviving shall have totam illam partem, equally to be divided. A. dies; the wife dies; the eldest daughter dies, leaving issue; the son dies without issue; the youngest daughter enters into Black Acre. But adjudged that the words *totam illam partem* extend only to the land, and not to the estate therein, and gives only an estate for life, and so *the husband shall not be tenant by the curtesy, and there are not two survivors, so nothing to be divided, and therefore the law says, that Black Acre is descended, viz. the fee of it to the daughters of the two sisters. 2 Le. 129. pl. 171. Mich. 29 Eliz. B. R. Hawkins's Case. 2 Le. 193. pl. 243. Hill. 29 Eliz. B. R. Freeman v. Cooke, 8. C. in totidem verbis, 3 Le. 180. pl. 239. Putman v. Cook, S. C. in totidem verbis. Cro. E. 52. pl. 2. Petywood v. Cook, S. C. and held, that only an estate for life was limited by the words.

9. J. P. the mother was seised in fee, and had issue E. and H. now plaintiffs, and by indenture, upon consideration of natural affection to her two daughters, covenanted to stand seised to the use of E. in tail, upon condition following, viz. that the said E. the heirs of her body, or their assignees, should pay to H. (now plaintiff) 30l. within one year after the death of J. the mother, or within one year after that H. should accomplish the age of 18 years, and for default of issue of E. the remainder to H. (now plaintiff) in tail; E. takes a husband, and has issue of her body, which live without issue, and E. did not pay the 30l. within the year after the death of J. the mother, and then H. (now plaintiff) came to the age of 18 years, and after E. died

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Le. 167. pl. 233. Sumner v. Payne. S. C. held accordingly; for the estate of E. is spent and determined by the dying without issue, and does not cease, or is

cut off by any limitation; and judgment given for the tenant by the curtesy.

And. 184. pl. 220. S. C. and S. P. adjudged accordingly.—8 Rep. 34. s. &c. S. C. but states no-

thing as to the condition of payment, but upon the limitation only and held, that though the estate tail is determined, yet the estate of the tenant by the curtesy continues; for this is not derived merely out of the estate of the feme, but it is created by the law, by privilege and benefit of the law, tacitly annexed to the gift.

Cro. E. 313. pl. 5. S. C. adjournatur.

—Ow. 148. 83 Eliz. Lilly v. Taylor, seems to be S. C. & S. P. held accordingly by

Popham and Crench.—See Gibb. 24. this case as to the limitations remarked upon and truly stated by Rastam Ch. J. in delivering the opinion of the Court. Pasch. 1. Geo. 2. A. R.

B. died within the year after that H. came to the age of 18 years; without issue, and afterwards the year passed, and no money was paid, whereby the plaintiff entered, and if the husband shall be tenant by the curtesy, was the question; and upon the motion, the Court was clear in opinion, that he shall be tenant by the curtesy, for the condition was gone; because B. died within the time which she had limited to her for performance thereof. And Anderson said, that if an estate be determined by limitation, this will not avoid a tenancy by the curtesy; but otherwise it is, if the estate be determined by a condition; for this shall relate to the defeasance of the estate. Goldsb. 83. 82. pl. 22. Hill. 30. Eliz. Plain v. Sallis.

10. Devise to A. his daughter for life, and if she marry after my death and have issue, &c. then I will, that her heir after my daughter's death shall have the land, and to the heirs of their bodies begotten, remainder to a stranger. This is only an estate for life, and the inheritance in her heir by purchase, resting in abeyance all her life and settling the instant of her death, so the baron of A. shall not be tenant by curtesy. Mo. 593. pl. 803. Hill. 35. Eliz. Clerk v. Day.

11. If lands be given to a woman and to the heirs male of her body, she takes a husband and has issue a daughter and dies; he shall not be tenant by the curtesy, because the daughter by no possibility could inherit the mother's estate in the land; therefore where Littleton saith, issue by his wife male or female, it is to be understood, which by possibility may inherit, as heir to her mother of such estate. Co. Lit. 29. b.

12. If a woman tenant in tail general makes a feoffment in fee, and takes back an estate in fee; and takes a husband and has issue, and the wife dies, the issue may in a formedon recover the land against his father, because he is to recover by force of the estate tail, as heir to his mother, and is not inheritable to his father. Co. Litt. 29. 6.

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13. A. has issue a daughter, and devised his lands to executors for payment of his debts, and till his debts are paid, and makes his executors, and dies. The daughter marries, and dies, the debts are paid by executors; the husband shall be tenant by the curtesy. 8 Rep. 96. Trin. 7. Jac. in Manningham's case.

14. A. devised the fee of his lands to B. his wife, remainder to C. for life, remainder to D. for life. B. has estate for life, and remainder expectant, and her baron shall be tenant by curtesy, cited by Crew Ch. J. to have been adjudged. Lat. 44. Trip. 2. Car.

15. Rest

15. *Rent granted to B. a feme, after the death of C. in fee; B. dies, C. dies; per Glyn Ch. J. the baron shall be tenant by the curtesy.* 2 Sid. 118. Mich. 1658. *Dethick v. Bradburn.*

16. Upon a special verdict the case was; *P. was seised of two messuages in fee after the death of his brother, and had issue two sons, R. his eldest son, and N. his younger son, and four daughters, E. M. O. and A. and made his will in writing, and devised his two messuages to N. his younger son, and he to have 30l. per annum for his maintenance for ten years after the death of his grandfather, and the residue of the profits to be applied for raising portions for his daughters; and if N. die, then he gives the estate, that N. had, to his four daughters, share and share alike; and then further says, and if it shall please God all my sons and daughters die without issue, then he devises it to his sister and her heirs, &c.* The devisor dies; the grandfather dies; and after, N. enters, and dies without issue; the four daughters enter, and are seised, and the one takes husband, and has issue, and dies, and the husband claims to be tenant by the curtesy; adjudged per tot. Cur. that here was no tenancy by the curtesy. *Skinn.* 266, pl. 3. *Hill.* 2 and 3 Jac. 2 B.R. *Price v. Warren.*

17. Wherever the estate is to determine by express limitation, or condition, on the death of the wife, there the husband shall not be tenant by the curtesy; as where an estate for life is limited to a woman; remainder to her first son, and every other son in tail male, remainder to the heirs of her body, remainder to her right heirs; here it is plain she is seised of the inheritance; yet if she has a son, the husband shall not be tenant by the curtesy, because the contingent estate, which is to arise on her death, intervenes between her estate for life and the inheritance. 9 Mod. 150. *Trin.* 11 Geo. in Canc. *Boothby v. Vernon.*

(D) The Nature of the Estate.

1. **I**F a nief purchases land, and takes baron, and the lord enters before that the baron has issue, there it seems that the baron by issue had, shall not be tenant by the curtesy. *Br. Tenant per se* Co. Lin. 30. *Curtsey*; pl. 14. cites *Doct. & Stud. Libro secundo.* b. S. P.

2. But if the baron and feme have issue before the lord enters, then he shall be tenant by the curtesy; for by the issue had, avowry shall be made upon the baron alone, and not before, and where if the feme dies, the possession is vested in the baron by the law, and not in the heir, if no other person enters, and he who is to use precept quod reddat, shall have it against the baron, and not against the heir, which is clear law. *Ibid.*

3. If lands holden of the king, by knight's service in capite, descend to a woman, and after office found she intrudes, and takes husband, and has issue. In this case, the husband shall be tenant by the curtesy. *Co. Litt.* 30. b.

4. If a man marries the niese of the King by licence, and has issue by her, and after lands descend to the niese, and the husband enters,

enters, the wife dies, he shall be tenant by the curtesy of this land, and the King upon any office found, shall not evict it from him, because, by the marriage, the wife was enfranchised during the coverture. Co. Litt. 30. b.

Co. Litt. 30. b. 5. In *gavelkind*, baron shall be tenant by curtesy, without issue; Arg. and seems admitted. 2 Sid. 153. Pasch. 1659. B. R. and in Marg. cites 9 E. 3. 28. 26 E. 3. Ald. 169. Stat. de Consuetudinibus Mancie.

(E) Tenant by the Curtesy. Of what.

Perk. S. 1. **T**HE wife is seized of a *reversion with certain rent* and has issue; the wife dies, the baron shall be tenant by the curtesy of the said rent, and the heir shall have the reversion, and so the rent shall be severed from the reversion by the means of the law; but in this case the *baron cannot distrain* for the said rent, and yet it was rent service in the feme; but because he comes to this rent by his own act he cannot distrain; for it was his own act to take the feme to wife. Kelw. 104. b. pl. 13. *Caus Inc.* Temp. Anon.

Arg. 1 Rep. 2. Though the rule in law is, that one shall not be tenant by the curtesy without actual seisin; yet in some cases a man shall, as where the *wife was never seized*, as if *rent descended* to the wife during marriage, and before the day of payment the wife dies, yet the baron shall be tenant by the curtesy, because no default can be in the baron; for he cannot have the rent before the day comes. Kelw. 104. b. pl. 13. *Caus incerti Temporis.* Anon.

3. Where an *office of inheritance* descends to the wife, and he has issue by her, the husband shall be tenant by the curtesy, and in the like case a feme may be endowed. Arg. Pl. C. 379. b. in Sir H. Nevill's Case.

4. It was held upon evidence that the husband shall not be tenant by the curtesy of a *copyhold*, unless there be an express custom to warrant it; Cro. E. 361. pl. 22. Mich. 36 & 37 Eliz. C. B. Paulter v. Cornhill.

S. P. Arg. 4 Rep. 22. Cro. E. 361. pl. 22. Mich. 36 & 37 Eliz. C. B. Paulter v. Cornhill. S. P. by agreed by Wray and Anderson Ch. J. on evidence to a jury in Rivet's case. S. P. by Coke Ch. J. and cited 4 Rep. 22. Brown's case. 2 Bulst. 337. Hill. 12 Jac. S. P. admitted per Cur. Hutt. 17. Pasch. 16 Jac. C. B.

5. If an *estate of freehold in feignories, rents, commons, or such like* be suspended a man shall not be tenant by the curtesy; but if the suspension be but for years, he shall be tenant by the curtesy. Co. Litt. 29. b.

6. If a *tenant makes a lease for life of the tenancy to the feignors, who takes a husband* and has issue, and the wife dies, he shall not be tenant by the curtesy. Co. Lit. 29. b.

7. But if the lease had been made but for years, he shall be tenant by the curtesy. Ibid.

[255] 8. If a *woman tenant in tail general takes a husband, and has issue, which issue dies, and the wife dies without any other issue, yet the husband shall be tenant by the curtesy, albeit the estate in tail*

tail be determined; because he was intitled to be tenant per legem Angliæ, before the estate in tail was spent, and for that the land remains. Co. Lit. 30. a.

9. But if a woman makes a gift in tail, and reserves a rent to her and to her heirs and the donor takes husband and has issue, and the donee dies without issue, and the wife dies; the husband shall not be tenant by the curtesy of the rent, for that the rent newly reserved is by the act of God determined and no state thereof remains. Co. Litt. 30. a.

10. But if a man be seised in fee of rent and makes a gift in tail general to a woman, she takes husband and has issue, the issue dies, the wife dies without issue, he shall be tenant by the curtesy of the rent, because the rent remains. Co. Lit. 30. a.

11. A man shall be tenant by the curtesy of a common sans nombre. Co. Lit. 30. b.

12. So he shall be of a house, that is caput baroniæ or comitatus. Co. Lit. 30. b.

13. And so he shall be of a castle, which serves for the publick defence of the realm. Co. Litt. 30. b.

14. Custom that if any wife seised of copyhold land has baron and they have issue between them, &c. and the wife dies, that the baron shall have the copyhold for life, as tenant by the curtesy. The husband takes to wife one, to whom copyhold descends, he enters into the land before any admittance claiming it in right of his wife; they have issue; but before admittance wife dies; it seems the better opinion of the Court was, that such entry was sufficient to entitle him to be tenant by the curtesy, but without a custom a man cannot be tenant by the curtesy of a copyhold estate. And 192. pl. 227. in case of Ewer v. Eastwick.

Mo. 271. pl. 425. Hill. 31 Eliz. C. B. Ewer v. Aiton, S. C. adjournatur, the Court being in great doubt upon another point.—Mo. 697. in pl. 813.

Pasch. 35 Eliz. in a note at the end of the case says, it seems a man shall be tenant by the curtesy before the admittance of the wife.—Per Doderidge, S. P. a Bull. 337. Hill. 12 Jac. and per Coke Ch. J. ibid.—It was so held upon evidence, Cro. E. 361. pl. 22. Mich. 36 & 37 Eliz. in C. B. Paulter v. Cornhill.

15. The defendant conveyed lands to the use of his daughters; the plaintiff married one and had children by her, who are dead; the plaintiff prefers his bill to be tenant by the curtesy, but held not so, because the daughters had joint estates, and so goes to the survivor. Toth. 83. cites 20 Jac. Cowley v. Anderson.

16. If one take a wife that is seised of gavelkind lands, and she dies without issue by her husband; her husband shall be tenant by the curtesy of half of the lands, so long as he shall live unmarried; but if he shall marry again he shall forfeit the estate in the land, Mich. 22 Car. 2. B. R. This is by the custom of Kent; but by the same custom, if he had issue by his wife, then he shall be tenant by the curtesy of all the lands his wife was seised of, and although he do marry again, he shall not forfeit his estate. Mich. 22 Car. Quære, whether in the former case he shall forfeit his tenancy by the curtesy, if he do live incantiently, as the wife shall her dower by a like custom. L. P. R. 627.

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17. One

17. One cannot have a right, title, use, reversion, or remainder expectant on a freehold as tenant by curtesy, or dower. R. S. L. 201. cites C. L. 29.

Ld. Somers said, that there was such an order, but the point was not debated.

* 18. A term to attend the inheritance which was in trustees was decreed not to be made use of against the baron, tenant by the curtesy, by the heirs at law. 2 Vern. 324. pl. 313. Mich. 1695. Snell v. Clay.

Ch. Prec. 98. — See Mid. 66. — S. C. of Snell v. Clay, cited by the Master of the Rolls, Hill. 1732. and said, that Ld. Somers himself, when this case was urged in the case of Brown v. Gibb, as an authority for a dower, it being taken for granted, that there was no difference in reason between that of dower and curtesy, his lordship seemed to admit it by avoiding the authority of that of Snell v. Clay, in saying (as above) that the point of a tenant by the curtesy was not debated in that case. 2 Wms's Rep. 638. in case of Sutton v. Sutton.

2 Vern. 585. and 681. S. C. cited. — S. C. cited by the Master of the Rolls. 2 Wms's Rep. 644. Hill. 1732. in case of Sutton v. Sutton. — S. C. cited Arg. Wms's Rep. 120. in case of Woll v. Ball.

19. Money was devised to be laid out in land and settled to the use of the wife and her children; she afterwards married the plaintiff, by whom she had a daughter, but mother and daughter are both dead; decreed the plaintiff to have the interest of the money during his life (it not being invested in land) as tenant by the curtesy; 2 Vern. 536. pl. 489. Hill. 1795. Sweetapple v. Bindon.

It seems to be admitted, that tenant by

20. Tenant by curtesy decreed of a trust. 2 Vern. 681. in pl. 605. cites the case of Worthington v. Fletcher.

the curtesy cannot be of a trust. 2 Vern. 488. in pl. 441. Hill. 1704. — Since 27 H. 8. cap. the baron shall be tenant by the curtesy of an use, though not before. 2 And. 78. Mich. 39 & 40 Eliz. in case of Cromwell v. Andrews. — Ibid. 147. Hill. 41 Eliz. in Corbett's case. * Per Coke Ch. J. Cro. J. 201.

A seised in fee had issue two daughters, L. and M. and devised

21. Though the inheritance was in trustees for payment of debts; yet decreed that the baron should be tenant by the curtesy. 2 Vern. 681. pl. 605. Hill. 1711. in the case of Williams v. Wray, cites it as Ball's case.

his lands to trustees in fee to pay his debts, and convey the surplus to his daughters equally. M. married and died, leaving a son and the husband living. On a bill for partition by L. the husband swore, that he married M. on a presumption that she was seised of a legal estate in the moiety, that at the marriage she was in the actual receipt of the profits of such moiety, and it was admitted that the trust was not discovered till after M's death, nor till it was agreed that a partition should be made. Lord Chancellor held, that he should be a tenant by the curtesy, and the rather, because it appeared that he upon his marriage did conceive and presume his wife to be seised of a legal estate in the moiety, and had reason to think so, she being in possession thereof; and decreed, that an estate for life in a moiety in severalty should be conveyed by the trustees to the husband, with remainder in fee to his son. Wms's Rep. 108. Hill. 1708. Watts v. Ball. — S. C. cited by the Master of the Rolls. 2 Wms's Rep. 645. Hill. 1732. in case of Sutton v. Sutton.

22. Husband may be tenant by the curtesy of a trust though the wife cannot have dower thereof; laid by the Lord Chancellor to be a settled rule. 3 Wms's Rep. 234. Hill. 1733. in case of Chaplin v. Chaplin.

MS. Rep. Hill. Vac. 21 Geo. 2. Calhoun v.

23. The resolution of the Court by Lord Chancellor. The principal question in this case, on which I am now to give my opinion, is, whether the defendant English can be tenant by the curtesy

Curtesy of an equity of redemption. The mortgagee came into possession in 1731. English and Scarf.

Thomas Calhborn, father of the plaintiff, and of the wife of the defendant English, by virtue of a marriage settlement, being seised of some lands in tail, and of other lands in fee simple, had issue three daughters.

Part of the land, of which he was seised in fee, he settled on himself for life, with remainder to Anne his eldest daughter in fee, and the other part of such lands he devised by his will to the said Anne his daughter, and her heirs, subject to the payment unto her two sisters of 200l. a piece.

Anne, after the death of her father, borrowed 900l. of the defendant Scarf, and by lease and release of 24th and 25th June 1728, mortgages part of the fee simple lands to the said Scarf and his heirs, under a proviso to be void on payment of 900l. and interest.

6th August 1729, the said Anne intermarried with the defendant English, and in 1731 died, leaving issue by him a son, who died without issue, and on his death his two aunts, the plaintiffs, became his heirs at law, and entitled to that inheritance, and, as such, brought their bill, Trin. 1733, in this court, against mortgagee defendant Scarf, and the defendant English, among other things for a redemption of the mortgaged premises, and to have an account of the rents and profits of the real estate, which belonged to the plaintiff's wife, that descended to his son, from the time of the death of such son, as heir at law to both of them.

The defendant English insisted to be intitled to the mortgaged premises for his life, as tenant by the curtesy, and the cause, being at issue, was heard on the 8th of May 1735 before his Honour the Master of the Rolls, when it was decreed, that the defendant English was not intitled to be tenant by the curtesy of the mortgaged estates, and so was decreed to account for the rents and profits thereof from the death of his son.

From this decree the defendant English thought fit to appeal, and the general question now is, whether the husband can be tenant by the curtesy *of the equity of redemption, upon a mortgage in fee?* This question depends on two considerations.

1st. What kind of interest an equity of redemption is considered to be in the eye of this Court?

2dly. What is requisite to intitle the husband to be tenant by the curtesy?

1st. What kind of interest in the eye of this Court, an equity of redemption is? *An equity of redemption has always been considered in this Court as an estate in the land, it is such an interest in the land as will descend from ancestor to heir, and may be granted, intailed, devised or mortgaged, and that equitable interest may be barred by a common recovery;*

Which proves, that an equity of redemption is not considered barely as a mere right, but such an estate, whereof, in the consideration of this Court, there may be a seisin, or a devise of it could not be good. The person who is entitled to the equity

of redemption, is, in this Court, considered as owner of the land, and the mortgagee to retain the land as a pledge or deposit.

And for this reason it is, that a mortgage in fee is, considered as a personal estate, notwithstanding the legal estate vests in the heir in point of law.

The husband of a mortgagee in fee shall never be tenant by the curtesy of the mortgaged estate, unless there be a foreclosure, or that such mortgage has subsisted for so great a length of time as the Court thinks sufficient to induce them not to grant a redemption.

A mortgage in fee will not pass under a devise of all my lands, tenements, and hereditaments, decreed in the case of *LITTON v. FAULKLAND*, 2 Vern. 625. There said, if it was a release of an equity of redemption or foreclosure, it is now part of the real estate in the land.

1 Vern. 401. *BARNET AND KINASTON*. A mortgage in fee in right of the wife on the husband's dying and not disposing thereof, was decreed to be a chose in action, and survived to the wife; from whence it follows, that the person that is intitled to the equity of redemption, is owner of the land; for if a mortgage in fee, in right of the wife, is, on the death of the husband, decreed to be but a chose in action, if the ownership of the land is not in the mortgagor, it is in no body; and if this matter of mortgages is not an interest in equity only, but properly a real estate, then the real property will be sunk and vested no where, if not in the mortgagee.

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If a man by his will devises lands, and afterwards mortgages in fee those lands; at law it is considered as a revocation of the total devise, but in equity only a revocation pro tanto, amounting to the same thing as letting in a charge upon the land, and when the mortgage is paid, the devise takes place.

The ownership of the land doth always vest in the mortgagor or mortgagee.

It is objected by the plaintiffs, that an equity of redemption is only a right of action, and not to be considered as such an estate whereof there can be a tenancy by the curtesy, but this is by no means well founded; for this is no otherwise a right of action than every trust, and as there can be no benefit had of an equity of redemption, but by suing a subpoena out of the court, so is the case of every mere trust in land, which is considered as a real estate in this court, but cannot be come at without a subpoena. To say that is a meer right of action, is by consequence to say, that the estate in the lands is in no body, and this determines the question; for if a mortgage is but a chose in action, this affirms that the equity of redemption is the real ownership of the estate, and this will determine the point between them:

It is objected, that the mortgagee is not barely a trustee for the mortgagor; it is true, not barely a trustee, but it is sufficient for the present purpose, if he is in part a trustee for the mortgagor, and it is most certain, that as to the real estate in the land, the mortgagee is only a trustee for the mortgagor till foreclosure. Mortgagee is only owner as a charge or incumbrance, and intitled

to hold as a pledge, and as to the inheritance descended, and real estate in the land, the mortgagee is a trustee for the mortgagor till the equity of redemption is foreclosed.

2dly. The next consideration is what is requisite to intitle the husband to be tenant by the curtesy. At law four things are necessary to make a tenancy by the curtesy, (to wit) marriage, having issue that may inherit, death of the wife, and seisin of the wife. Co. Litt. 30. a. Here it is admitted, that the three first did concur, but the objection that is relied on is, that there was no actual seisin of the wife during the coverture, which is contended to be as necessary in respect to an equitable estate, as of a legal estate, and it is admitted that the wife had no actual seisin of the legal estate, either in fact or in law. Here is no dispute whether actual seisin in consideration of law, but all that is beside the present question; for the proceedings are upon a supposition, as no such thing as a tenant by the curtesy; but the true question is upon this point, whether there was not such a seisin or possession in the wife of the equitable estate in the land, as in consideration of equity is equivalent to an actual seisin of a legal estate at common law.

In consideration of this court, I am of opinion there was such a seisin of the wife in the present case of the equity of redemption.

I have shewn, that a person, intitled to the equity of redemption, is owner of the land of the legal estate; and if so there must be a seisin of the legal estate; and what other seisin could there be than what English and his wife had in the present case?

For here is a mortgage in 1728 by Ann Cashborn, who in 1729 married with the defendant English, and in 1731 died, leaving issue a son, and the wife was all along in possession till her death, and mortgagee did not come into possession till after her death, and there is not any foreclosure, and though the possession of the wife was but as tenant at will to the mortgagee, yet it was, in equity, a possession of the real owner of the land, subject only to a pecuniary charge on it, and from thence I think it clearly follows, that there cannot be a higher seisin of an equitable estate. [159]

Next, whether there can be a tenant by the curtesy? I am of opinion there may be a tenant by the curtesy of the equitable estate of the wife; equity follows the law because made a rule of property.

WILLIAMS AND WRAY, 2 Vern. 680, **BALL'S CASE** cited, where it was determined, that the husband be tenant by the curtesy of a trust estate of the wife, and so clearly there admitted, and yet the case was of a trust for the payment of debts.

SWEETAPPLE AND BINDON, 2 Vern. 536, Mrs. Bindon gave money to be laid out in land to be settled on her daughter and her issue, and afterwards the mother dies, and the daughter marries with Sweetapple, by whom she had issue, and dies before the money was laid out in lands, and upon the death of the wife Sweetapple brought his bill, praying that the money might be laid out in lands, and that he might be decreed to hold the same for his life

as tenant by the curtesy, which my Lord Cowper decreed accordingly; which is a much stronger case than the present; for in that case there was neither seisin nor lands, but it was determined according to the common received rule of this court in considering money directed to be laid out in land, the same as land.

There has been two objections made by the plaintiffs.

1st. That the husband had it in his power to have had seisin in his wife's life-time; for he might have paid off the mortgage, and therefore it was his own laches that he did not.

2d. That a wife shall not be endowed with an equity of redemption, and so here.

As to the laches in the defendant English it was compared to the husband's not making an entry at law. The comparison will not hold; for it is not so easy to pay off the principal and interest due on a mortgage, as it is to make an entry at law, nor is it to be done so speedily, for a mortgage in most cases is allowed six months notice to be paid off.

And in the case of Sweetapple, which I have just mentioned, the husband might have brought his bill, in his wife's life-time, to compel the laying out the money in the purchase of land, but though he omitted so to do till after the wife's death, yet that was not objected to him as laches.

But it was further said, that it would encourage the defendant English to let the interest run on the mortgaged premises, which would perhaps swallow up the whole estate; for that at the said defendant's death there might be as much due on the mortgage for principal and interest, as the estate would then be worth; but I cannot find the force of this ground; for if he is owner of the estate, she was owner of the fee.

If by this is meant the interest that became due in the life of the wife, the husband has nothing to do with it; because the interest that he claims does not arise till the death of the wife, and he therefore is not to pay interest that was due before his title accrued.

But by this is only meant the interest from the death of the wife; during the tenancy by the curtesy, the heir will have the same remedy as in the common case of a tenancy for life of an incumbered estate; for in all such cases the tenant for life keeps down the interest.

[160] And as to the next objection of the wife's not being endowed of an equity of redemption on a mortgage in fee, and that therefore a husband ought not to be tenant by the curtesy of an equity of redemption, this proves too much; for it has been determined that a wife shall not be endowed of a trust estate, yet that husband shall be tenant by the curtesy of a trust estate. The argument from dower to the case of a tenant by the curtesy fails in this case. Perhaps it may be hard to find out a sufficient reason, how it came to be so determined in the one case, and not in the other, but it is safe to follow former precedents, and what are settled and established, and if such precedents should be departed, I hold it fit rather, that the wife should be allowed her dower

of a trust estate, and not that a tenancy by curtesy of a trust estate should be taken away.

It may be refusing to allow the wife dower of a trust estate was because she could not have it at law, and that it was founded on the maxim of *equitas sequitur legem*; but whatever the reason of such refusal was, the husband is allowed to have a *tenancy by the curtesy* of a trust estate, nay even of money directed to be laid out in land though not actually laid out, as in the case of Sweetapple before cited.

Upon a mortgage for years, wife shall have aid of equity of redemption, which she could not have of a trust estate. If tenant by the curtesy of money to be laid out in land, by analogy it ought to be so of an equity of redemption, especially where the wife continues in possession of the mortgaged lands all her life-time.

As to **PENVILL AND LUSCOMB'S CASE** heard at the Rolls, Feb. 4, 1728; that was a pauper cause, and a question was made in it, whether there could be a *possessio fratris* of an equity of redemption; his honour made no determination in it; but it appears by the minutes in the Register's book, which I have seen, that his honour said, he would take time to consider of it, and I do not find that it ever came on afterwards.

There was a case put on the part of the plaintiffs by way of illustration; which was this, suppose that a *feme sole* conquers lands to *J. S.* in fee, upon condition, that if at such a day she paid such a sum of money to him, or his heirs, that then she might re-enter; she afterwards marries and has issue, but before the day on which the condition was to be performed she dies, and after her death her heir pays the money; whether the husband would be tenant by the curtesy? If this is meant as a mortgage to make a security, then it is the same as the present case, but if it is meant of a meer purchase subject to a re-entry at common law on payment, undoubtedly the husband would not be tenant by the curtesy; for that were to make him tenant by the curtesy of a condition; for taking it as a purchase, the wife had, in that case, no estate or *seisin* in re, nor right of re-entry, till the performance of the condition.... As to a condition, or power of revocation, these stand upon different reasons.

For these reasons, upon the best consideration, (although I form my judgment with great deference, when I differ in opinion from other great persons that have gone before me) I am of opinion, that the defendant English is intitled to be tenant by the curtesy of the mortgaged premises in question, and the consequence of that is, that that part of the decree of his Honour the Master of the Rolls, whereby it is adjudged that the said defendant is not tenant by the curtesy, must be reversed. MS. Rep. Hill. Vac. 11 Geo. 2. *Cashborn v. English and Scarf*.

(F) Favoured. In what Cases; and of what the Tenant may take Advantage.

1. **A** *FINE* levied by *feme covert* alone, without her husband, of her own lands, wherein she has fee simple, is an estoppel against her and her heirs, if her husband avoid it not by entry, or otherwise, as he may during his wife's life, and after her death, during his own life, as if he be tenant by the curtesy. West. Symb. S. 8. cites 17 Ed. 3. 52 and 78. 17 Aff. 17. 7 H. 4. 23.

2. Tenant by curtesy shall have benefit of *warranty*; for though he is in the post, yet he continues the estate; per Wray Ch. J. 2 Le. 218. in pl. 275. Pasch. 16 Eliz. B. R.

And. 63. pl.
137. S. C.
but S. P.
does not
appear.—
Co. Litt.
486. b. S. P.

3. Tenant by the curtesy of a *coparcener* of an *advowson* shall have the same advantage as his wife should have had; agreed by Anderson. Cro. E. 18. pl. 6. Pasch. 25 Eliz. C. B. in the case of Harris v. Nichols.

(G) Bound by, or liable to what Charges, &c.

1. **F** *EME* tenant in tail acknowledged a statute, and took baron, and had issue, and died. The lands may be extended in the hands of tenant by the curtesy, and also in the hands of tenant by the curtesy, and also in the hands of the issue in tail, if tenant by the curtesy surrenders during the life of tenant by the curtesy. D. 51. pl. 17. Marg. cited by Noy in his reading to have been so adjudged. Mich. 6 Eliz.

2. Tenant by the curtesy shall be attendant to the Lord Paramount. 8 Rep. 36 Trin. 29 Eliz. 3. C. B. in Paine's case.

3. Tenant by the curtesy is not to be prejudiced by term for years to attend the inheritance, and decreed accordingly, that the term should not be made use of against him by the heirs at law. 2 Vern. 324. pl. 313. Mich. 1695. Snell v. Clay.

(H) Prevented or disabled by what Act, or Default. In what Cases.

Bo. Fortes.
Lutwidge
Trenth, pl.
78. cites
S. C. —
Co. Litt.
40. a. S. P.
where the
wife was

1. **A** *MAN* took a *feme* inheritrix, and had issue by her, and did felony, and was attainted, and by some the baron shall be tenant by the curtesy; for it is vested by the law, and he is in the post by the law, and not by the feme, or by the issue, and some e contra; for all is forfeited; *quære*? For by several elsewhere he is tenant by the curtesy, and that after issue had, the lord may

avow

grow upon him only for homage without the feme. Br. Tenant per le Curtesie; pl. 3. cites 21 E. 3. 49.

here] so as the issue cannot inherit to her, yet he shall be tenant by * the curtesy in respect of the issue which he had before the felony, and which by possibility might then have inherited, but if the wife had been attainted of felony before the issue; albeit she had issue afterwards, he shall not be tenant by the curtesy. — The year book of 21 E. 3. 49. b. 50. a. pl. 8. is of felony alone by the wife. — Pollexf. 51. in case of Parsons v. Pearce, Arg. S. P. Co. Litt. 30. a. S. P.

2. A man discontinued the land of his feme, and retook an estate to him and his feme, by which the feme is remitted, and after he has issue by this feme, and the feme dies; per Kingmill, the baron shall be tenant by the curtesy, because the feme was remitted; but Fairfax, Tremail, and Hufsey contra; for the baron was not remitted, and by the feoffment he gave his right which he had, or might have. And 30 E. 3. the question came between the issue of the feme and the father, and there it is adjudged, that he shall not be tenant by the curtesy. Br. Tenant per le Curtesy; pl. 6. cites 9 H. 7. 1.

3. If a feme takes baron, and has issue, and land descends to the feme, and the baron enters, so that he is intitled to be tenant by the curtesy, and after the feme is found an idiot, and his estate in the land is also found, the King shall have the land; and if the feme dies, the baron never shall have the land by the curtesy; and when the office is found, the title of the King shall have relation to the first possession of the feme also, and so both the titles commence at one and the same time, but the King shall have the pre-eminence; and because the King's title is to the franktenement of the land seeing he shall have the custody of it during the wife's life, this wholly takes away the baron's title; per Weston. Pl. C. 263. b. Mich. 4 & 5 Eliz. in case of Dame Hales v. Pettite. Co. Litt. 30. b. S. P. and cites S. C.

4. A woman inheriatrix takes husband, who after is attaint of felony; the King pardons him; they have issue; the husband shall be tenant by the curtesy, which proves the King has not the freehold by that attainder; per Coke Counsel, Arg. 2 Le. 126. Mich. 28 and 29 Eliz. in case of Venables v. Harris. If after the pardon he has other issue, he shall be tenant by the curtesy; Arg.

Noy 159. cites 12 H. 7. — If a feme takes baron who have issue, and after he is attainted of felony, and then the King pardons him, per Keble he shall not be tenant by the curtesy by the issue had before; contra if he had issue after. Br. Tenant per le Curtesy, pl. 15. cites 13 H. 7. 17.

5. Baron and feme seised of land in right of the wife (whereof the baron was intitled to be tenant by the curtesy) levied a fine, which, upon error brought, was reversed, because she was within age, and the reversal was for both, and the baron adjudged to re-have, so as the fine was utterly avoided. Cro. J. 482. cites Charnock v. Worsely. Cro. E. 129. pl. 1. Pasch. 31 Eliz. B. R. S. C. adjudged, that the fine should be reversed in toto. —

Le. 114. pl. 157. S. C. and the fine reversed accordingly. — S. C. cited Ow. 21. as resolved accordingly. — S. P. by Holt Ch. J. who said, it is to be considered, whether his title to be tenant by the curtesy is not extinguished if the fine be reversed after her death; but indeed, if the fine be reversed in her life-time he may have a new title. 5 Mod. 67. Mich. 7. W. 3. B. R.

6. By Stat. 3. Jac. 1. cap. 5. *A popish recusant convict, who is married otherwise than in open church, and by a lawful minister, according to the orders of the church of England, shall not be tenant by the curtesy.*

7. A man married his father's sister's daughter. This is no cause of divorce; but it was adjudged, that though that marriage [might be said to] be within the levitical degrees, yet it is a *marriage de facto*, and only avoidable by divorce, which, after the death of the husband, cannot be done, because thereby the issue will be bastardized; and if the wife had been inheritrix, &c. the husband should have been tenant by the curtesy; and vouched 7 H. 4. Noy. 29. Hill. 15 Jac. C. B. Rennington v. Cole.

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9. Four things do belong to an estate of tenancy by the curtesy, viz. marriage; seisin of the wife; issue and death of the wife. But it is not requisite that these should concur together all at one time; and therefore if a man takes a woman seised of lands in fee, and is disseised, and then have issue, and the wife dies, he shall enter, and hold by the curtesy. So if he has issue which dies before the descent, as is aforesaid. Co. Litt. 30. a.

Perk. 3.
474. S. P.
that after
the wife's
death he
may enter
for the
condition
broken,
and when

10. A man is intitled to be tenant by the curtesy, and makes a feoffment in fee upon condition, and enters for the condition broken, and then his wife dies, he shall not be tenant by the curtesy, because albeit the estate given by the feoffment be conditional, yet his title to be tenant by the curtesy was inclusively absolutely extinct by the feoffment, for the condition was not annexed to it, Co. Litt. 30. b.

he hath re-entered, he shall hold the same land as tenant by the curtesy; *tamen quare.*

11. The reason of the difference why a wife, in case of an elopement with an adulterer, forfeits her dower, and yet the husband leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy, is, because the statute Westminster 2. cap. 34. does by exprets words, under these circumstances, create a forfeiture of dower; but there is no act inflicting, in the other case, the forfeiture of a tenancy by the curtesy. 3 Wms's Rep. 276, 277. Pasch. 1734. in case of Sidney v. Sidney.

(I) Pleadings in Actions by or against Tenant by the Curtesy.

1. *In principe quod reddat* the tenant pleaded, that *h. his feme, was seised, &c. and married him, and had issue T. and died*, so he is tenant by the curtesy, the reversion to T. and prayed aid of him, and a good plea, without expressing the surname of his feme. Br. Pleadings, pl. 16. cites 40 E. 3. 37.

2. The *barren of the eldest parsoner*, who is tenant by the curtesy, shall have *quare impedit* in his turn. Phil. Dig. 24. Lib. 2. cap. 1. S. 44. cites Hill. 5 H. 5. 10.

3. In

3. In *waist against tenant by the curtesy*, he said, that his *feme* never had any thing after the *coverture*, &c. and held, that the pleading was not good; because it was only argumentative, by which he pleaded, that one *Alice* infeoffed him, *absque hoc*, that he had ever any thing by the curtesy. *Theil. Dig.* 173. Lib. 11. cap. 53. S. 9. cites *Mich.* 20 H. 6. 2.

4. Tenant by the curtesy, though not expressly named in the writs mentioned in *stat.* 13 E. 1. 4. yet he is within the mischief and purview of that statute, for he is *tenant for term of life*, § *Inst.* 353.

For more of tenancy by the curtesy in general, see other proper titles.

(A) [In what Cases a Custom shall be] void for uncertainty.

See Tit. Prescription (D)

[1. A CUSTOM ought to be certain.]

[2. Such custom shall be void for want of certainty, which in case of such grant would be void for want of certainty. D. 1. *Tanistry* 35. (Quære this, for there may be a custom, which may not begin by grant.)]

This is Roll is in Poli 569.

[3. A custom, that when an infant is of such an age that he can count 12d. or measure an ell of cloth, that he may make a *feoffment*, is void for the uncertainty. 13 E. 3. *Fitz.* Dum fuit infra *statum.* [pl. 3.] Da. * 1. *Tanistry* 33.]

A C. cited Arg. 3 Ec. 88.—S. C. cited by Robert Ch. J. who

said, that a certain age ought to be set down, that the Court may judge it an age of discretion; for custom must not deprive the law of nature.

* [This seems to be a mistake of the printers, and that it should either be omitted, or be made a (v) to join to Da. and so would be Dav.]

[4. A custom that such of the tenants of the manor who comes first to such place, &c. shall have all the wind-falls there, is not good for the uncertainty. 14 E. 3. *Fitz. Bar.* 227. Da. * 1. *Tanistry* 33.]

Fitz. Bar. pl. 277. cites S. C. & S. P. * See pl. 3. and the notes there.

—*Dav. Rep. Tanistry.* 33. a. cites S. C. that such custom is void for uncertainty; but *ibid.* 35. a. b. cites S. C. [only it is misprinted, 177. instead of 277] that the custom is good, because the time of the first coming may well be tried.

[5. The custom of *tanistry* of Ireland, that the land shall descend *seniori & dignissimo viro sanguinis & cognominis* of him that died seised, is not good for the uncertainty of the person and estate.

Da. 1. [Dav.] *Tanistry* 35.]

[6. But a custom, that it shall descend to the most worthy of the blood is good. Da. 1. *Tanistry* 35. b.]

Gibb. 55.
Taylor v.
Scott, 6. C.

7. A custom alledged and found by verdict to pay 10d. to the vicar at the usual time of churching women, was held to be void; 1st. Because it was not alledged, what was the usual time the women were to be churched, and therefore uncertain; 2dly, Because it was unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she went out of the parish, or died before the time of churching; judgment was arrested. 2 Ld. Raym. Rep. 1558. Pasch. 2 Geo. 2. Naylor v. Scott.

[165] (A. 2) What it is; and How established.

1. A CUSTOM, in the intendment of law, is such a usage as hath obtained the force of a law, and is in truth a binding law to such particular places, persons, and things which it concerns, and such custom cannot be established by grant of the King, according to 49 E. 3. 3. a. or by act of parliament. But it is *jus non scriptum*, and made by the people only of such place where the custom is. Dav. Rep. 31. b. 32. a. Hill. 5 Jac. B. R. in the case of *Tanistry*.

(B) In the Negative.

See Tit.
Prescription
(Q) per tot.

Custom
does not lie
in the nega-
tive, but
may be in
the nega-

[1. A CUSTOM may be in the negative, mixed with an affirmative. 8 H. 6. 4.]

[2. So it seems, that a custom *meerly in the negative* is good. 8 H. 6. 5.]

negative with an affirmative precedent, as to prescribe to buy and sell without paying toll; but it is no good custom to say, that he has not paid toll; and the law seems to be the same of being quit of tithes; per Paston. Br. Customs, pl. 23. cites 7 H. 6. 31, 32. and 8 H. 6. 3. — But he may prescribe in the affirmative; as to say, that he and his ancestors have been quit of toll time out of mind. Br. Prescription, pl. 76. cites 18 E. 4. 3. by Littleton.

(B. 2) Commencement. And how it differs from Prescription.

1. CUSTOM may be alledged, where there is no person who can prescribe. Br. Prescription, pl. 100. cites 2 M. 1.

2. As inhabitants cannot prescribe, but they may allege custom, that the inhabitants may common in D. and the one goes with the

the place, and the other with the person, which person ought to be able to prescribe; for otherwise it is not good. Ibid.

3 Where a man prescribes to go quit of tithes for his lands in D. where all others of D. pay tithes, this is void; for custom cannot be particular, but ought to be throughout a country or vill. Br. Prescription, pl. 93. cites Doct. & Stud. Lib. 2. cap. 55.

4. Prescription goes to one man, and a custom to many. Brownl. 133. Hill. 6 Jac. in case of Rolles v. Mafon.

ence between freehold and copyhold land, that in the last case a prescription in a particular place, as for every copyholder of such a particular wood to cut trees there growing is good; but a custom which concerns freehold land ought to be throughout the county, and cannot be in a particular place; per Walmley, which Beaumont agreed. Cro. E. 353. pl. 10. Mich. 36 & 37 Eliz. C. B.

*[166]

And so of places there is a difference

5. Prescriptions are either *personal*, and in this inhabitants may prescribe, as for a way, or matter of ease; or *real*, and this is inherent in the estate, as where he prescribes by a que estate; or *local*, where a man prescribes to have a thing appendant, or appurtenant, to his manor, that whithersoever the land goes, the prescription is concomitant to it. Arg. 2 Brownl. 210. Hill. 7 Jac. B. R. in case of Marsham v. Hunter.

6. Naturally a prescription, or thing prescriptible is so to be laid, where by law it may, and not by way of custom, and where it cannot be by law, and is therefore *pleaded by way of custom*, the nature of it is not changed, but remains still a prescription in its kind, though it be allowed to be pleaded by way of custom for necessity's sake; and it appears in Gateward's Case, 6 Rep. 59. b. that a thing lying properly in prescription, as *common* did in that case, being an interest which must inhere in somebody, can't be pleaded by way of custom, nor stand by custom, where it can't stand by prescription, as there they would have made it for *inhabitants* that are not permanent to prescribe. But yet for common for copyholders in the Lord's soil, it is allowed to be pleaded by custom for necessity's sake; whereas, in the soil of another, it must be laid by prescription in the Lord, and yet the nature of both is a prescription; per Hobart Ch. J. Hob. 86. pl. 114. Trin. 12 Jac. in case of Day v. Savage.

7. A matter of *discharge* may be laid by way of custom, for that it is no interest, but an exemption, not positive, but privative, of the general possession; per Hobart Ch. J. Hob. 86. Trin. 12 Jac. in case of Day v. Savage, cites Gateward's case.

8. As to prescription and custom, this difference ought to be observed. A prescription ought to stand upon reason; but a custom can't have commencement but by parliament, and not by grant, as Borough English and Gavelkind, no reason being to maintain these but only by act of parliament; per Coke Ch. J. 2 Bullf. 206. Pasch. 12 Jac.

Roll. R. 46. per eundem S. P. for those customs cannot be created by patent S. C. —

ibid. 48. Arg. S. P.

9. A custom goes to land, and a prescription to persons. Arg. Poph. 201. Mich. 2 Car. B. R. in case of Jenkin v. Vivian.

10. A custom can't extend to a particular place; Arg. Poph. 201.

Sir Francis North, Arg. Vent. 390. speaking of the claim

of the free-
men of Lon-
don to be
discharged of *wherfage*, which was adjudged not a custom, but a prescription, calls it a *local pre-*
scription to *privilege persons in a certain place and condition*, which he says is, in its nature, *between*
a *prescription* and a *custom*, and not a custom, because it concerns the discharge of persons, and it
is merely local; nor a prescription, because it is not annexed to any estate, nor to any person, but
in relation to a certain place and condition; and yet it is rather termed a prescription; for it is
said, that inhabitants may prescribe for an *custom*, or a discharge, but a strict prescription to
make title to a real interest is so nice, that it cannot be *pleaded* by way of custom, nor confounded
with it. Inhabitants, or freemen, or citizens, cannot prescribe in that kind.

[167]

See Tit.
Prescrip-
tion (X)

(C) Custom against Custom.

Cro. C. 438. 1. IF in an action upon the case a man *prescribes*, that he, and
pl. 2. Spoon- all those whose estate he hath in the manor of D. hath
er v. Day, used time out of memory, &c. to have a *fold-course*, scilicet, com-
2 S. C. ad- mon of pasture for sheep, not exceeding 300, in certain land, at
judged.— appurtenant to his manor, and that the defendant hath inclosed part
Jo. 375. pl. of the land, in which he ought to have the common of pasture for
1. S. C. ad- the said sheep, &c. and the defendant pleads, that there is a *custom*
judged. time out of mind, &c. that the owner of the land, in which the com-
mon of pasture for the said sheep is to be taken, had used time out
of mind, &c. to enclose any of the said land in which the common of
pasture is to be had; this is not good within a traverse of the *pre-*
scription, for this is a custom against a custom, which cannot stand
together, scilicet, that one should have the fold-course time out
of mind, and the other might enclose it, and exclude the fold-
course. Trin. 11 Car. B. R. and Mich. 11 Car. between Day
and Spooner, per Curiam, over-ruled without argument, in a writ
of error upon a * judgment, to the same intent in Banco. In-
tratur Mich. 6 Car. Rot. 183. Hill. 11 Car. it was adjudged per
Curiam accordingly.]

* Fol. 566.

S. C. cited
Arg. Bullf.
115, 116.
— See
Customs
(D) pl. 1.
S. C. —
See Tit.
Stopping
Lights, per
tot.

[2. In an action upon the case for stopping ancient lights, if
the plaintiff declares, that he was *seised of an ancient house in the*
city of York, and that he, and all those whose estate, &c. have had
time, &c. *seven ancient windows*, and that the defendant had *erected*
a new house upon his own land, next adjoining thereto, by which he
stopped the said windows, and the defendant pleads in bar, that there
is a *custom within the said city time out of mind, &c. that if any*
one hath windows against the land of his neighbour, that he may stop
the said windows and lights upon his own land, at his will and
pleasure, by force of which custom he stopped the said windows;
this is no good plea, for a custom against a custom is not good,
for both are of equal antiquity, and the one cannot have a pre-
scription to have the lights, and the other to stop them, time out
of mind. Tr. 29 El. B. R. between Bland and Mosely, adjudged
upon a demurrer; cited Co. 9. Aldred's Case. 58.]

S. C. cited
Freem. Rep.
210. pl. 217.
Trin. 1676.
in case of
Mickman v. Thorney, which see at prescription (X) pl. 2. and the notes therey

58. b.]

4. In replevin the defendant *alleged a custom of the manor, that qualibet femina viro cooperta joining with her baron in a surrender of copyhold; and being privately examined by the steward, makes it a good surrender.* Plaintiff replied, that there is a custom in the manor, that qualibet, &c. who is of full age, may surrender, but that the feme in this case was within age, but did not traverse the custom quod qualibet, &c. and therefore the Court held it ill; for the plaintiff confessing a particular custom, ought to traverse the general custom alleged by the defendant. Litt. Rep. 274. Trin. 5 Car. C. B. Anon.

(D) Who shall be bound by a Custom. [168]
The King.

[1. A CUSTOM that exalts itself upon the King's prerogative, is void against the King. Da. 1. [Dav.] Tanistry 33.]

Raym. 77
Palsch. 15
Car. 2. B.
R. Twifden
J. denied

the opinion of Lambert, that if the King purchases gavelkind lands, they shall go to all his sons; and says, that Lambert had it out of Plowden, 247. a. from Southcote's opinion, and he from 35 H. 6. cap. 28. a. — Sid. 138. cites S. P. per Twifden accordingly, but that Twifden said the custom is only suspended by reason of the prerogative; for so soon as it comes into other hands it shall descend again as gavelkind. — If the King purchases lands of the custom of gavelkind, and dies, having issue divers sons, the eldest son shall only inherit these lands; and the reason of these cases is, for that the quality of the persons doth in these, and many other like cases, alter the descent, so as all the lands and possessions, whereof the King is seised in jure coronæ, shall, secundum jus coronæ, attend upon and follow the crown, and therefore to whomsoever the crown descends, those lands and possessions descend also; for the crown and the land, whereof the King is seised in jure coronæ, are comitatua. Co. Litt. 15. b.

[2. It is no good custom, that when any distress shall be taken for the King's debt within the precinct of such a manor, that it shall be brought to the pound of the lord, there to continue for three days, within which time, if the owner of the distress pays it, he shall have back the thing distrained, because this is not any manner of profit to the lord, but of service; and usage shall not bind the King without his special grant. 21 E. 3. 4. b. adjudged.]

[3. The custom of London to retain goods put in mortgage till satisfaction be made of the money upon them lent, extends to the King's jewels. 35 H. 6. 26. Da. 1. [Dav.] Tanistry 33. b.]

Br. Cuf.
tom 4. pl. 5.
cites 35 H.
6. 25. —
Fitzh. Cuf.

tom, pl. a. cites S. C. — Jenk. 83. pl. 62. S. P. cites 35 H. 6. 35. [but is misprinted, and should be fol. 25, 26, &c.]

[4. If a man hath toll or wreck, or strays, by prescription, this extends not to the King's goods. Da. 1. [Dav.] Tanistry 33. b.]

It was argued by several, that a

custom which arises upon the person or goods shall not bind the King; contra of custom which arises upon the land, as gavelkind, or Borough English, this shall bind him. Br. Prerogative, pl. 5. cites 35 H. 6. 25. — And it was said there, that the King shall not pay toll, pontage, nor passage. Ibid. — Nor lapse of advowson, nor alienation of villein before seizure shall not grieve him. Ibid. — So so defects shall not toll his entry. Ibid. — And his goods shall not be forfeited, as waif, stray, nor as wreck, for default of proving the property within the year; nor by sale in market overt, nor where custom of the land is to pay fine at the alienation, the King shall not pay fine for it if he purchases it. Br. Prerogative, pl. 5. cites 35 H. 6. 25. — Jenk. 83. pl. 62. S. P. and cites S. C.

[5. It is a good custom of the county of Chester that if the King's tenant in capite by knight's service dies, his heir being within age, that the King shall not have the lands held of other lords by knight's service; and this is there said to be secundum consuetudinem, ab antiquo semper per quandam prerogativam hactenus in comitatu præd. obtentam & usitatam. 23 E. 1. Rotulo Clausarum Membrana, 9 The custom allowed. The like in Membrana 10 & 24 E. 1. Membrana, 3.]

*[169.]

Roll. Rep.

350. Parsons

v. Lea. S. C.

adjournatur.

— Ibid.

436 Lea's

Cafe, S. C.

but no judgment.

— Palm. 414.

†Fol. 567.

Pafton v.

Lea, S. C.

and Crew,

Doderidge,

and Whit-

lock held,

that the cus-

tom cannot

bind B. R.

[6. There is a custom in Cheshire, that if a debtor comes before the Chamberlain of Chester, and there takes his oath that he is not able to pay the debt, but that he will as fast as he can, that he shall have a protection; and it is ordained by the statute of [34] H. 8.

*[cap. 13.] that such protection shall not be allowed without the King's warrant; and if an action of debt be brought here in B. R. and the plaintiff hath judgment, and sues an elegit, directed to the Chamberlain of Chester, to extend certain lands within the county-palatine of Chester, † he ought to execute it notwithstanding the said custom, for the custom cannot extend out of the county-palatine to bind the King's courts, for the Chamberlain is but a minister in this to execute the process of the Court. P. 1 Car. between Barny and plaintiff, against Sir Urian Leigh, adjudged, and a new elegit awarded after the said matter returned.]

7. Customs that go with the land bind the King, as gavelkind, Borough English, &c. Jenk. 83. pl. 62. cites 35 H. 6. 25.—See pl. 4. in the notes.

8. But no custom shall bind the King for his person or goods; as pontage, murage, waif, estrays, toll, lapse, alienation of a villein before seisure. Jenk. 83. pl. 62.

9. By the custom of Kent, if a man be hanged for felony the King shall not have annum diem, & vastum, nor the lord any escheat of these lands in Kent, the custom there hinders it. 3 Bulst. 213. Mich. 14 Jac. B. R. in a nota on the case of Rosewell v. Welsh.

There is not any letter between (D) and (K) in Roll.

(K) What Persons may do Things by Custom, which they cannot do at Common Law.

[Infants.]

* Fitzh. Custom, pl. 9. cites S. C. but then this custom shall be taken strictly; for it has been adjudged, that a release made by him at such age is void per Belk and Vavisor.

[1. BY custom an infant may make a feoffment at the age of 15. Co. 9. Combe 76. b. * 5 H. 7. 41. Doctor and Student 21.]

By such custom he may bind himself by deed, but not by the common law, per Danby; and therefore in action brought of the departure, the Court ought to be upon the custom, as it seems. Br. Customs, pl. 63. cites S. C.

[2. By the custom of a town an infant may bind himself apprentice. 9 H. 6, 7, 8. per Danby.]

3. It

3. It was admitted a good custom, that infant within age may *devise his land.* Quod nota bene. Br. Customs, pl. 29. cites Br. Depar-
37 H. 6. cap. 5. ture, pl. 9. cites S. C.

*** (L) What Persons shall be said to be bound by a general Custom.**
[Infants, Ideots, &c.]

[1. **I**F a custom be, *that a devise made of lands, and a proclamation made thereof, and nonclaim within a year, shall bind all men,* yet an infant shall not be comprehended within this custom, for he is exempt by reasonable construction of law, because he hath not discretion to make his claim. 37 Ass. 5.]

[2. If a custom be, *that when a copyhold descends to any man, a proclamation shall be made at three several courts, that he shall come to be admitted, and if he does not come at any of the several courts, and pray to be admitted, it shall be forfeited to the lord;* yet an infant is not comprehended within this custom, because by intendment of law he cannot make claim. Co. 8. Lechford 100. adjudged.]

[3. So for the cause aforesaid, men of *unsound memory in prison,* and out of the realm, are not within such custom. Co. 8. Sir Richard Lechford 100. b.]

[4. So if the custom of London be, *that the mayor may take recognizances of any persons, being of full age, or of women unmarried;* this custom shall not bind ideots, men of unsound memory, or in prison, for they are excepted by the reasonable construction of law. Trin. 32 Eliz. B. R. between Chamberlain and Thorp, dubitatur.]

zance, and have no remedy to avoid them, and therefore infants and feme coverts, which may, are particularly excepted in the custom.——Le. 130. pl. 178. S. C.

Cro. E. 186, 187. pl. 11. S. C. says, that men non sane memorie, may acknowledge a recogni-

(M) To what Things it shall be said to extend.

[1. **I**F a custom be, *that every tenant of such an honour bath used time out of mind, &c. to pay a fine upon every alienation;* this custom shall not extend to the *demefne-lands* in the hands of the lord, but only to tenements in the hands of the tenant. 14 H. 4. 8, 9.]

[2. If a custom be, *that the lord ought to have the best beast of him that dies his tenant, and the parson of the parish the second-best beast, as a mortuary;* if the tenants hold two several tenements of the lord, subject to the custom, within the parish, it seems the lord shall have the two best beasts within the intent of the custom, and the parson the third. Dubitatur, 7 H. 6. 26. b.]

the second best beast. Br. Hagiots and Mortuaries, pl. 3. cites S. C. accordingly,

Br. Customs, pl. 22. cites S. C. Issue was joined on the custom, whether the parson should have

Cro. E. 434.
485. pl. 46.
S. C. ad-
judged. For

+ Fol. 568.

peradventure the

stranger dug it lawfully by the lord's licence.——Mo. 411. pl. 561. S. C. adjudged.——See tit. Common and Commoner, (B) pl. 13.

[3. If the inhabitants upon a common have used time out of mind, &c. to dig clay in the said common of their lord, for the reparation of their houses standing upon the said common, and a stranger digs clay in the common, the inhabitants cannot take this clay + from him, for this is not within their custom. Mich. 37. 38 Eliz. B. R. between Stile and Butt, adjudged.]

[[3]. If the custom of a manor be, that when any tenant sells his tenements, three proclamations shall be made in the next court-day of the manor, and that if any of the blood of the vendor will give so much money for the tenement as the vendee will, that he shall have it; and a tenant, in consideration of 100l. in money, and that the vendee, being his physician, hath cured him of a great malady, sells the tenement to him, and the next of the blood comes to the next court, and proffers 100l. for the tenement, yet he shall not have it, for this was given partly for the other consideration, which is not valuable, and so it is not within the custom, for by the custom it is to be intended where the vendee comes in only for money. H. 37. El. B. R. by two justices; but by this means every one may evade the custom.]

[4. So if he had sold the tenement in consideration of a lease for years of other land, and 1d. the next of blood should not have the tenement upon the proffer of the 1d. H. 37 El. B. R. held.]

Cro. E. 879.
pl. 10. S. C.
adjudged.

—Yelv. 1.

S. C. ad-
judged.—

Noy. 42.

S. C. ad-
judged.—

S. C. cited

per Cur.

Raym. 404.

Mich. 32

Car. 2. B. R.

—S. C.

cited Arg.

Cart. 86, 87

—See tit.

Copyhold.

Jenk. 83. pl.

72. S. P.

[5. If the custom of the manor be, that if any copyholder in fee surrenders out of court, and he, to whose use it is surrendered, does not come in at the court to take his copyhold, after three proclamations made, that then the lord may seize the copyhold as forfeited, and a copyholder in fee surrenders to the use of another for life, the remainder over in fee, and the tenant for life does not come into court to take his copyhold after three proclamations made according to custom, upon which the lord seizes the copyhold as forfeited, and after cestuy que use for life dies; he in the remainder shall not be bound by the not coming in of the lessee, for the custom being in destruction of an estate, shall be taken strictly, and so it shall be intended only of tenant in fee in possession, and not in remainder, as this case is, and so this is out of the custom. P. 44 El. B. R. between Baspole and Long, adjudged.]

6. Custom of London, that if any goods are pawned there, the pawnee may detain them till the money be paid; this custom does not intitle him to detain the goods of a stranger. 2 And. 152. per Cur. cites 35 H. 6. 26.

7. A custom is in London, that none ought to intermeddle with the art of a weaver there, but only those who are free of the Guild. If a stranger receives silk in London, and carries it to H. and weaves it there, and then brings it back again to London, and receives his pay for it; resolved, that this is not any intermeddling with their trade in London against the custom, though the contract

was made in London; adjudged for the defendant. Cro. E. 803. Hill. 43 Eliz. London weavers v. Brown.

8. Custom that the *eldest daughter shall solely inherit*; this shall not *extend* to let the eldest sister inherit by force of this custom. So if the custom be that the eldest daughter and eldest sister shall inherit, the eldest aunt shall not inherit by that custom; and so if the custom be, that the youngest son shall inherit, the youngest brother shall not inherit by the custom. Godb. 166. pl. 232. Pasch. 8 Jac. C. B. Rapley v. Chaplain. And Foster J. said it was so adjudged in one Denton's case.

9. A custom *is always infra manerium*, and a matter extra [172] manerium can never be by the custom, as a custom to have common out of the manor is void. Arg. 2 Show. 131. pl. 109. Mich. 32 Car. 2. B. R. in the case of Zinzon v. Talmash.

10. Customs are *stricti juris*. 2 Jo. 142. Pasch. 33 Car. 2, B. R. Zinzan v. Talmage.

Pollex. 561.
S. C. —
2 Show.
131. S. C.

and P. Godb. 166. Denton's case. — Litt. R. 235. in case of Turner v. Hodges. — Bridgm. 50. Arg. —

11. General customs may be extended to *new things* which are *within the reason* of those customs; and 5 Co. 82. * Snelling's case is an authority in point, where, by the custom of London, *executors* may pay debts, viz. simple contracts in equal degree with bonds; and adjudged, that *administrators* were within the custom, though created by 31 Ed. 3. within time of memory, because within the same reason. 12 Mod. 271. per Holt Ch. J. in delivering the opinion of the Court, Hill. 11 W. 3. in case of the city of London v. Vanacre.

Ld. Raym.
Rep. 499.
S. C. and S.
P. per Holt
Ch. J. ac-
cordingly.
* S. C.
cited 2 Jo.
204. per
Cur. Pasch.
34 Car. 2.
B. R.

12. A custom of a manor cannot be *applied* to a particular house within a manor. Lutw. 128. Trin. 13 W. 3. Nicholson v. Smith.

13. All customs which are *against the common law* of England, ought to be *taken strictly*, nay very strictly, even stricter than any act of parliament that alters the common law: per Trevor Ch. J. in delivering the opinion of the Court. 11 Mod. 160. Hill. 6 Ann. C. B. in case of Archer v. Bokenham.

14. It is a general rule, that customs are *not to be enlarged beyond the usage*, because it is the usage and practice that makes the law in such cases, and not the reason of the thing; for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage; and therefore you cannot enlarge such custom by any parity of reason, since reason has no part in the making of such custom; per Trevor Ch. J. 11 Mod. 160, 161. Hill, 6 Ann. C. B. in case of Archer v. Bokenham.

(N) What Act shall be said a good Pursuance of the Custom.

Gavelkind [&c.]

Br. Customs. pl. 15. cites S. C.—
Fitz. Custom, pl. 11. cites S. C.—
See tit. Gavelkind. (C) pl. 1. and the notes there.

[1. **W**HERE the custom of gavelkind land is, *that an infant of the age of 15 may make a feoffment*, this ought to be *taken strictly*; for if he is *disseised*, and *releases to the disseisor*, this is not within the custom, for it is not a feoffment. 11 H. 4. 33.]

Br. Customs. pl. 15. cites S. C.—
and per Hank. a release to disseisor is no feoffment.—Fitzh. Custom, pl. 11. cites S. C.

[2. So if he *releases to the disseisneur*, this is not within the custom. 11 H. 4. 33.]

[173]
S. P. per Belk. Br. Customs, pl. 15. cites S. C.—Fitzh. Custom, pl. 11. cites S. C.

[3. So if he *grants a reversion dependent upon an estate for life*, it is not good. 11 H. 4. 33. b.]

Per Hank. quod Thir. concessit. Br. Customs, pl. 15. cites S. C.—Fitz. Customs, pl. 11. cites S. C.—If he makes a lease, the same is not warranted by the custom. 3 Le. 83. at the end of pl. 110. Mich. 29 Eliz. B. R.

[4. But if he *leases for years*, and *releases to him*, it is a feoffment within the custom, because the freehold passes by the release. 11 H. 4. 33.]

Br. Customs, pl. 15. cites S. C.—Fitzh. Custom, pl. 11. cites S. C.

[5. [But] if an infant after 15 makes a *feoffment with warranty*, the warranty is not warranted by the custom. 11 H. 4. 33.]

Cro. E. 783. pl. 21. S. C. adjudged according-ly.—See tit. Trespas, (G. a) pl. 13. * Fol. 569. and the notes there.

[6. If there be a custom within a town to have 2d. for every *hide of every sheep, cow, or ox, that is killed, or sold, within the said town, and for nonpayment thereof, to seize the hides, &c.* the party that is to have the 2d. cannot by this custom justify the *tanning the hides, and converting them into leather*, which he took for the nonpayment of the 2d. though he did it for necessity, scilicet, because they would * be putrefied, for this is only a damage to the owner, and he might have debt for the 2d. M. 42. 43 El. B. R. between Duncon and Reeve, adjudged.]

[7. A custom was found in a manor, *that when an estate was granted to A. for life, remainder to B. for life, remainder to C. for life, that A. had power to destroy the remainders by surrendering the estate in court, &c.* And it was found that *A. granted it away by fine*. And it was held per Cur. that the remainders were not destroyed, nor granted by the fine; for this being a custom against common right, that one man should destroy the right of another, it ought to be *pursued strictly*; and the custom being found to do it by surrender, a fine shall not have that operation within the custom.

custom. Freem. Rep. 263. pl. 284. Mich. 1679. Talmarsh v. Zinzay.

(O) Destroyed. How; and in what Cases.

1. **A.** SEISED in fee of land in *Borough English*, [after the stat. 27 H. 8.] makes a feoffment to the use of himself and the heirs males of his body, according to the course of the common law; these words, according to the course of the common law, are void; for *customs which go with the land, as this is and gavelkind, and such like customs which fix and order the descents of inheritances, can be altered only by parliament.* By Catlin, Dyer, Sanders, Whiddom, Browne, Bendlowes. Jenk. 220. pl. 70. cites D. 179. [b. pl. 45. Pasch. 2 Eliz. Anon.]

2. A custom once reasonable and tolerable, if after it becomes grievous, and not answerable to the reason whereupon it was grounded, yet is to be taken away by act of parliament; for an inheritance once fixed, cannot be taken away but by parliament. 2 Inst. 664.

3. The question was whether the statute 14 Car. 2. cap. 2. being an affirmative law for the election of scavengers, had taken away a custom in Southwark? And it was held by North, Atkins, and Windham, that it had destroyed the custom; the authorities cited where affirmative *acts should not destroy customs, were Dy. 19. 50. 3 Cro. 125. 2 Le. 74. 1 Inst. 115. 23 H. 8. 5. 11 Rep. 59. 64. Mo. 113. Hob. 173. And they seemed to take a difference, that where a statute is introductory of a new law, there it shall take away all contrary customs, though there be only affirmative words; but if there were a law before, that shall not be destroyed by affirmative words. And though an opinion has prevailed, that, notwithstanding the statute of magna charta, where there is a custom for holding leets at other times than are mentioned in the statute, it shall be well enough, and so the law is taken; but North said, if that statute were to be construed now, it would hardly be so taken. Freem. Rep. 203. pl. 206. Mich. 1675. Anon.

Mod. 99. Mayor, &c. of London v. Galford. S. C. but adjournatur, to be argued again. * [174]

(P) Pleadings.

1. **D**ETINUE by the heir of heir loomes, or principals of his ancestor, viz. the best of every sort of goods, and counted upon the custom of the county, and it was held a good custom, and the defendant durst not demur, and it was admitted that the heir might have action, though he never had property before, or possession; for the law and custom adjudges property and possession. Br. Customs. pl. 27. cites 39 E. 3. 6.

2. In an action brought by co-heirs in gavelkind, or by the younger brother in *Borough English*, or by a feme in Nottingham of dower of a moiety, &c. the plaintiff ought to declare upon the custom

Br. Detinue de Biens, pl. 30 cites S. C.

custom and prescribe in it, and shew it in his count, and otherwise ill, quod nota; per Cur. Br. Count. pl. 91. cites 5 E. 4. 8.

3. If a custom be that the feme shall have the third part of the goods of her husband, if he has issue, and if he has not issue, then the moiety, there if she brings *rationabili parte bonorum de medietate*, she ought to count of the custom, and that the baron had no issue. Br. Customs, pl. 70. cites 7 E. 4. 20, 21.

4. *Trespas of breaking his close, subverting his land, and spoiling his grals, the defendant said, that the land is one acre, called F. and that the custom of this land is, and time out of mind was, that every one who has land in the said F. viz. head-land, in plowing his land may turn his plow upon the said head-land, and that the defendant had half an acre abutting upon the said land, and in plowing the said acre he turned the plow upon the said land, and in turning the point of his coulter, raised a little parcel of his land, and one of the oxen took his mouthful of grass, which is the same trespass. Per Townsend the custom is not alleged to be throughout the country, but only in one close, which cannot be a custom, but Brian e contra, and that this use is throughout the realm, where one has land adjoining to another's land in the field, but in such an action of trespass, Pasch. 22 E. 4. 8. the defendant said that the custom of the county of Middlesex is, where this land lies, that where a man goes to plow in the same county, it is lawful for him to turn his plow upon the land next adjoining if it be not sowed with grain, and per Cur. he shall say it has been used there time out of mind, &c. and not that it is lawful, &c. by which he said accordingly, and that this land was the land adjoining, by which he turned his plow upon it, and that because he could not well govern his horses they turned up a foot of land, which is the same subversion of soil, &c. and as to the grass said, that one of his horses in turning took a mouthful of grass against his will, which is the same depasturing, &c. Per Catesby, where a man drives a drove of cattle and they do so against his will, this is a good justification; contra, if he suffers them to continue there, and the plea awarded good, and the custom admitted good. Br. Customs pl. 51. cites 21 E. 4. 28.*

[175]

5. Information in the Exchequer against a merchant for lading wine in a strange ship, the defendant pleaded licence of the King made to J. S. to do it, which J. S. had granted his authority thereof to the defendant; and that there is a custom among merchants throughout England, that one may assign such licence to another, and that the assignee shall enjoy it, &c. which was demurred in law, and it was agreed for law, that a man cannot prescribe custom throughout England; for if it be throughout England it is a common law and not a custom, contra if the custom had been pleaded to be in such a city, or county as gavelkind, borough English, Gloucester fee, &c. Note the diversity. Br. Customs, pl. 59. cites 34 H. 8.

6. In trespass the custom of a manor was, *quod quilibet tenens per copiam poterit dimittere [devifare] terras suas, for life, or years in fee, or aliter, and that a married woman might devife her copyheld lands to any other, or to her husband, by the assent of the*

Codb. 14.
pl. 22.
Pasch. 25
Elix. C. B.
Skipwith's
case. S. C.

the

the husband; a feme covert devised her land to her baron (the defendant) accordingly. The Court held that the custom was not unreasonable, but it is alleged, quod *poterit* devifare, which word (*poterit*) is a word of justification, and that should be *ut sunt* devifare; it was adjudged against the plaintiff. Mo. 123. pl. 268. Pasch. 24 Eliz. Anon.

states it like-
wife, that
she surren-
der it in the
presence of
the reeve
and fix
other per-
sons, and

that a surrender was made accordingly. Anderson Ch. J. said, that instead of the word (*poterit*) it should be, that feme coverts possunt, and that by the custom have used to devife to the husband, and therefore the prescription is not good: Adjournatur.——Ibid. 143. pl. 178. Trin. 33 Eliz. Skipwith v. Sheffield. S. C. Anderson said, it shall be intended that the wife being sub potestate viri, did it by coercion of her husband. It was then urged, that the custom might be good, because the wife was to be examined by the steward of the court, as the manner is upon a fine to be examined by a judge; but to this the Court said nothing.——3 Le. 81. pl. 122. Pasch. 20 Eliz. S. C. according to Godb. 14. et adjournatur.——2 Brownl. 218 Arg. cites it to be adjudged 24 Eliz. in one Skzoe's case, [which seems to be S. C.] that inasmuch as this was annexed to her estate, which began by custom, the custom was good.——S. C. cited, that the custom was good, but the alleging it by the word (*poterit*) was ill. Supp. to Co. Comp. Cnp. 84.——A custom found within a manor, that every tenant of the said manor potuit & potuisset furium reddere, &c. was adjudged naught. Raym. 4. Arg. cites Pasch. 37 Eliz. Bishop's case.

7. A custom was set forth, that *licet & licuit for the lord of the manor to assess a pain for the breach of a bye-law*. Arg. Raym. 4. cites it as adjudged void, Pasch. 37 Eliz. Sir William Hatton's case.

8. In pleading usage and custom, it must be pleaded, that it *was put in ure*. Cro. E. 392. pl. 15. Pasch. 37 Eliz. C. B. Arg. cites it as held in C. B. in Hatton's case.

9. *Parcener by custom* in his declaration must *make mention* of the custom, as to say the land is of the custom of *gavelkind*; but he shall not prescribe in it. And so it is of *burgh English*; and these two vary in that point from other customs; for the law when they are generally alleged takes knowledge of these two. Lit. S. 265. and Co. Lit. in his Comment thereon. 175. b.

10. It appears by the Register, and many of our books, that there must be a custom alleged in some county, &c. to enable the wife or children to the writ de *rationabili parte bonorum*, and so it has been resolved in parliament. Co. Lit. 176. b. versus finem.

11. In *trespass* the defendant justified by a custom in the manor of T. the plaintiff replied *de injuria sua propria absque tali causa*, &c. Though the plaintiff should not have traversed the cause generally, but the custom, yet that was adjudged holden by the statute of Jeofails, as matter of form; because absque tali causa contained the custom and more. Hob. 76. pl. 97. Banks v. Parker.

12. In covenant the plaintiff declared upon the customs of London, that every freeman may take apprentices, and that infants may bind themselves, &c. After a verdict for the plaintiff, it was moved in arrest of judgment, that this custom was pleaded in fieri when it ought to be in fact; because customs and prescriptions consist in reiterated acts, and therefore there must be an usage to support them; but judgment was given for the plaintiff. Raym. 4. Hill. 12 Car. 2. B. R. Windhurst v. Gibbs.

[176]
Cro. C. 347.
9. Hill.
9 Car. B. R.
The King
v. Bagshaw.
S. P.

Keb. 836.

pl. 19. Cor-

nelius v.

Tupor. S. C.

the plain-

tiff de-

murred, be-

cause the

close ap-

pears out of the manor of C. and quilibet inhabitants haberes is no sufficient averment, which the Court agreed, and it ought to have been, that every inhabitant within the said manor of C. hath had and used a way over N. (the close in which the trespass was supposed.) Judgment for the plaintiff, nisi.

13. In *trespass*, quare clausum fregit in C. the defendant *pleaded* that the manor of C. is an ancient manor, and that within the said manor is a *custom*, that *every tenant habere a way over the place where, &c.* Upon which the plaintiff demurred, and judgment was given for the plaintiff that the plea is ill. Sid. 237. Hill. 16 & 17 Car. B. R. Cornelius v. Taylor.

14. In *trespass* for taking three tuns of hay, the defendant *justifies*, for that he was meadow-reeve, chosen at a *leet secundum consuetudinem manerii*, and that time out of mind the meadow-reeve had used to collect the bishop's rents, and had used to have for his pains out of the meadow in quo, &c. as much hay as he could draw upon an ordinary cart; and so justifies for his load of hay, and doth not aver that it was upon an ordinary cart; and the Court seem to incline that the plea was not good, because he had not applied his case to the custom; fed adjournatur. Freem. Rep. 101. pl. 114. Pasch. 1673. Lincoln (Bishop) v. Atwood.

3 Keb. 250.

251. pl. 74.

S. C. and

judgment

for the

plaintiff,

nisi; and

cites Hill.

24 Car. 2.

Piers v. Deayon.

15. In a *trespass* against an officer of an inferior court if a custom be alleged in a court after a *plaint* levied, to take out *process*, and he alleges that the *process* was taken out (but alleges no *plaint* levied) he is a trespasser. Freem. Rep. 356. pl. 449. Mich. 1673. Bennet v. Therne.

16. *Trespass* for breaking his close, called the market-place, and erecting a stall there, the defendant justified by virtue of a custom of the manor for all tenants to set up stalls there to sell their goods, and that he being a tenant, &c. and a butcher, set up a stall there to sell flesh; plaintiff demurred because defendant did not say expressly, that the market-place is within the manor; but the Court held that there is a sufficient averment that the locus in quo is within the manor; it was also objected, that the custom is to set up stalls for selling their goods, and the plea is that he set up a stall to sell flesh, without saying (his) flesh, and so it may be the flesh of a stranger, and for that reason, judgment was for the plaintiff; but it being a hard case, the Court moved the parties to agree to amend the plea and go to trial on the merits, and so they did. 3 Lev. 190. Mich. 36 Car. 2. C. B. Chatin v. Bettsworth.

17. A custom ought not to be laid in the negative; admitted 2 Ld. Raym. Rep. 869. Pasch. 2 Ann. Ogle v. Norcliffe.

18. In an action brought upon a custom, it ought to be shown what the custom is, otherwise it is not maintainable. 2 Ld. Raym. Rep. 1134, 1135. Pasch. 4 Ann. B. R. in the case of Winchester (Mayor) v. Wilks.

(Q) Trial of Custom.

1. **W**HERE a custom is pleaded in *the vill, court, or country, where the custom is used*, there it shall be tried by the Justices, and by the Court, and not by the country. Br. Trials, pl. 104. cites 11 E. 4. 2.

2. *Contra, where it is pleaded in another court, as the custom of N. is pleaded in C. B. &c.* there it shall be tried per pais. Ibid.

3. *Contra, where it is pleaded in N. where the custom is known.* Ibid.

[For more of custom in general, see Common, Copyhold, Customs, Prescription, Toll. And other proper titles.]

* Customs.

(A) What Customs are good.

What Customs are good in respect of the Estates that shall be bound by them.

[1. **D.** 19 El. 357. [b. pl.] 46. adjudged, that the custom of a town that a tenant in fee of socage-land shall not + devise or grant leases for more than six years, and if he does, that the leases shall be void, is a custom against common reason, and the liberty of [one that has] a fee-simple. (Semble, book intends a devise by the statute.)]

that the word (devise) here should be (demise) and the one is frequently misprinted for the other. — Jenk. 89. pl. 68. at the end S. P. and cites S. C.

* The common law is the general custom of the realm, and particular customs, which bind not univer-

Fol. 558.

fally, make those which are called customs. Br. Customs, pl. 89. cites 7 H. 6. 31, 32. and 8 H. 6. 3. — It seems

(B) Gavelkind.

[1. **P.** 4 E. 1. b. Rot. 2. Margeria, quæ fuit uxor Johannis Godfrey, petit versus Willielmum de Dagenham *medietatem*, &c. defendens dicit, quod consuetudo de gavelkind (unde prædictum * tenementum tenetur) talis est, quod *vidua amittet dotem, si fornicata vel maritata fuerit, & quod dicta Margeria peperit filium de quodam Willielmo A. post mortem viri sui, ob quod debet amittere dotem.* Margeria concedit talem esse consuetudinem, & dicit, quod nunquam fuit *convicta*, secundum quod convinci debet secundum legem de gavelkind, dicit enim *quod ipse inquisivisse*

* [178] Raym. 76. 77. Arg. cites S. C. Sid. 136. Arg. cites S. C.

inquisivisse debuit per insidias quando ipsa fuit in parturiendo, & tunc debuisset ipsam cum puero suo capisse cum clamore & butefio; unde sicut ipsa nunquam convicta fuit secundum legem de gavelkind, petit judicium si debet repelli a dote. Defendens dicit, quod fornicata est, ideo veniat jurata, &c. Et jurata dicit quod talis est consuetudo ut supra, & quod ipsa est fornicata, & non est necesse quod ipse capiatur cum puero in parturiendo cum butefio & clamore. Ideo Margeria in misericordia, & defendens sine die.]

S. P. per
Cur. Freem.
Rep. 105.
Palch.
1673. in
case of Ran-
dall v.
Richil.

2. The plaintiff brought a writ of dower, to be endowed of the moiety of the manor of C. and several other lands of the nature of *gavelkind* in Kent. The defendant pleads the *statute of 31 H. 8. cap. 3.* whereby these lands, amongst others, were disgavelled; the question was, whether this collateral custom of endowing with a moiety be taken away by the statute, or no? And it was resolved per Cur. that *the statute extends only to alter the descent, and as for the other collateral customs, leaves them as they were before.* Jud' pro quer. as to that point. Freem. Rep. 47, 48. pl. 57. Trin. 1672. C. B. Brooke v. Thomlinson.

3. There are several beneficial customs of *gavelkind*, as first, that they are *not forfeitable for murder, or felony*; 2dly, The husband shall be tenant by the curtesy, without issue; 3dly, *Devisable* before the 23 H. 8. 4thly, The wife shall be endowed of a moiety quamdiu casta vixerit; 5thly, *Not forfeitable upon a cessavit*; 6thly, An infant at 15 may alien. Arg. Freem. Rep. 48. pl. 57. Trin. 1672. C. B. Brooke v. Thomlinson.

[For more of gavelkind, see Descent, Gavelkind, Heir (F. 5.)]

(C) What Customs are good. What not.

Mo. 588.
Arg. circa
the same
rule, and that *malus usus est abolendus.*

[1. **C**ONSUETUDO *ex certa causa rationabili usitata privat communem legem.* Lit. 37. Davies 1. 32.]

2. Trespas for digging land, the defendant said that it is four acres adjoining to the sea, and that all the men of Kent have used time out of mind, when they fish in the sea, to dig in the land adjoining, and pitch stakes to hang their nets to dry; Nele said he ought to shew what men. And per Choke and Littleton this is no custom; for it is contrary to common right and reason. And per Danby, fishers may justify the going upon the land to fish; for it is for the common wealth, and for the sustenance of several, &c. and is the common law, quod fuit concessum. Per Fairfax, the digging is destruction of the inheritance, and therefore is no custom. Br. Customs, pl. 46. cites 8 E. 4. 18.

[179] 3. Trespas of cutting grafs, the defendant said that there is such a custom in the county of Kent, that when any enemies come to the sea coast, that it is lawful for all of Kent to come upon the land adjoining to the same coast, in defence and safe-guard of the country, and there to make their trenches and bulwarks for the defence

defence of the same country, and said, that at time of the same trespass enemies came, &c. by which they dug to make trenches and bulwarks, &c. And per Jenny it is the common-law to do so in defence of the realm. But Casesby contra inde, &c. quære. Br. Customs, pl. 45. cites 8 E. 4. 23.

4. In the Law-book are many cases of *customs allowed for particular reasons in particular places*, which if they were general would be contrary to law and common-equity, and this in lands, goods, and liberties, and as well in causes spiritual, as temporal; and therefore the custom of *borough English, gavelkind*, and for an *infant to sell land*, if they were general, would be against common right; but yet they are allowable upon particular reasons, which are not now disputable, in certain particular places. Arg. Mo. 583. As tenant of the church of Hereford, that holds in socage, shall be in ward to the dean and chapter, which is contrary to common-law and equity, cites 8 H. 3. Fitzh. Prescription, 53.

5. So the custom of *tenant-right*, in the north parts, that one who takes estate by deed and livery of seisin for his life shall have inheritance customary descendable to his heir, and the lord compellible to make to every heir and purchaser such estate for ever; which is contrary to common equity; but allowable for the policy of strengthening the borders against Scotland with such persons, as shall not be removeable, and shall increase in unity of alliance and consanguinity, whereby they will join with much greater courage in the service against the Scots. Arg. Mo. 588. in pl. 796. Trin. 41 Eliz.

S. P. Arg.
Sid. 267. pl.
18.

6. So the custom, *that the executors of a copyholder for life shall have the land for a year after*. Arg. Mo. 588.

7. And the custom of *Cheltenham* in the county of Gloucester, *that if a tenant in base tenure of inheritance takes feme, and has issue by her, and dies; and the feme takes second baron and she has issue by him; he shall gain the land to him, and if he has no issue he shall have the land for his life and twelve years after*. Arg. Mo. 588.

8. So the custom of *Linne* is, *that if any vill takes toll of a freeman of Linne, he shall take as much in withernam*, when any of such place comes with goods to Linne; and this allowed a good custom, or grantable by charter, and those of Newcastle, who have taken toll of one of Linne, have made recompence upon withernam there taken, which is contrary to common equity, that the goods of one man shall be taken for the fault of another. Arg. Mo. 588.]

9. So the custom of *the cinque ports*, and of the tower of London, *to take withernam of Londoners*, if any Londoner has arrested a freeman of the cinque ports, or of the liberty of the tower is against common equity, but the custom is good, by reason that those places are to be full of people for safety. Arg. Mo. 588.

Mo. 603. pl.
834. Hill.
41 Eliz.
C. B. in
case of Pa-
ramour v.
Verrall, a

case was vouched Anno 18 Eliz. between a freeman of Diepe in France, and a freeman of Sandwich, which was upon the same custom of Sandwich put in ure, the consideration of which was committed by the Queen upon the letters of the King of France, to Wray and Dyer, and to two civilians, who certified the custom good; but Anderson, Walmesley, Owen, and Beaumont, held the prescription not good; but Walmesley doubted much, because the 5 ports are places defensive of

of the realm, whereby there may be a special reason that they shall not attend elsewhere for their justice than within the cinque ports.—*2 And 151. pl. 85. S. C. adjudged by assent of all the justices, that the custom shall not be allowed; and that judgment shall be given for the plaintiff.*

10. So in trespass the defendant justified by a custom, that if *bags came into the street they should be taken and killed and carried to the hospital for sustenance of the poor there, and allowed good, though *contrary to equity.* Mo. 588, 589. Arg. cites 11 R. 2. Fitzh. Custom pl. 46.

11. So the custom of York, that goods there, foreign bought and foreign sold shall be forfeited, is a good custom, but against common equity; and if it was universal throughout the realm, it certainly would not be allowable. Mo. 589. Arg. cites D. 270. 10 & 11 Eliz.

12. So in London, a villein inhabiting there for a year shall be *infranchised.* Arg. Mo. 589.

(D) What Customs are good.

What Customs shall be good in Destruction of a Prescription.

S. C. cited
Arg. Bull.
115, 116.
—See
Custom (C)
pl. a. S. C.
—See
tit. Stop-
ping lights
per tot.

[1. **C**O. 9. William Aldred 58. b. is cited, that the 29 El. Bland brought an action upon the case against Mosely, and counted, that whereas time out of memory, &c. there had been seven lights to his house, the defendant in York city had erected an house upon his land, and stopped them, to which the defendant said, That the custom of the city is &c. that such obstruction super terram suam per ædificationem is lawful, and adjudged not good, because the custom cannot take away the prescription, and it may be, that the prescription began by grant. *Quære*, for there is such custom in London.]

Fol. 559.

(E) What shall be against the Law of Reason.

Hob. 175.
pl. 196.
Topfal v.
Ferrers, S.
C. ad-
judged.—
S. C. cited
by Twissden
as a bad cus-
tom. Mod.
48. in pl.
103.

[1. **I**T is not a good custom in London, that if any stranger comes into any parish in London, and dies there; and his body is carried and buried out of the parish, that so much shall be paid for his burial, and other things belonging thereto, as for the sermon, &c. to the parish where he dies, as is paid in the place where he is buried; for this is against reason to bind strangers by such a custom for burial, who are not compellible to come to the church to receive the sacraments there. P. 15 Ja. B. Sir J. Ferris's case, resolved per Curiam, and a prohibition granted accordingly, upon a suit in the spiritual court, by the parish of St. Botolph, London, where the party died, for these duties.]

Cro. J. 203.
pl. 36. S. C.
adjudged;
for the cus-

[2. It is a good custom, that whereas *J. S. is seised in fee of the manor of T. and all the tenements in the said town are held of the said manor; that he and all those, &c. have had time out of mind,*

mind, &c. a bakehouse, parcel of the said manor, maintained at their charge, and that this bakehouse was sufficient to bake bread for all the inhabitants, and for all passengers through the said town, and the bread there baked and used, &c. to be sold at reasonable prices, and that no other person, within the said town, had used to bake any bread to sell to any person. This is a good custom, though it restrains other men to exercise their trades within a certain place. H. 32 El. B. R. between Sir G. Farmer and Brooke, per Curiam. M. 32. 33 El. B. R. adjudged, for this might have a reasonable beginning to bind his own tenants, as this only does. Co. 8. 125.]

tom is between the lord and his tenants, which by indenture may have a good and lawful beginning, and peradventure their lands were given to them upon this condition.

tion.——Le. 143. pl. 199. S. C. argued.——Ow. 67. S. C. adjudged, that the action will not lie.——S. C. cited 8 Rep. 126. b. as adjudged per tot. Cur. a reasonable custom.——S. C. cited a Brownl. 179. Arg.——S. C. cited a Bullt. 195. Arg. as adjudged a good and reasonable custom.——S. C. cited 3 Bullt. 61. by Coke Ch. J. who said, that the plaintiff ought to aver, that his oven was sufficient to serve them all.——a Roll. Rep. 201. Arg. cites S. C.——Raym. 387. Arg. cites S. C. and Mich. 1657. B. R. ALLOT v. JACKSON, and resolved that the plaintiff must aver, that his mill was sufficient to grind all, and that he was bound to do so.

[3. If there be a custom within the parish, that the parson of the said parish ought yearly to find a bull and a bear within the said parish, for the increase of cattle for the maintenance of hospitality; and that, in consideration thereof, the parson shall have the tenth of the increase, &c. This is a good custom, for it is grounded upon a good consideration, inasmuch as the parson shall have the tythe and tenth of the increase. Tr. 39 El. B. R. per Curiam.]

Mo. 555. 356. Yielding v. Fay, adjudged that the action lies.——Cro. E. 569. pl. 4. Yielding v. Fay, S. C. adjudged.

——See Actions (N. c) pl. 35. and the notes there.

[4. It is a good custom, that where he and all, &c. have time out of mind been seised of a mill in the parish of D. that all the inhabitants within the said parish ought to grind all the grain that they expend in their messuages, or tenements, at the said mill. This is a good custom, though all the inhabitants are not his tenants. M. 11 Ja. B. R. between Higgs and Gardiner adjudged; for this custom may have a reasonable beginning, as by composition upon building the mill.]

a Bullt. 195. Hix v. Gardiner, S. C. adjudged for the plaintiff.

[5. A custom against reason is void. D. 1. Tanistry 32. b.]

[6. [As] a custom, which is injurious and prejudicial to a multitude, and beneficial only to some particular person, is repugnant to the law of reason. Davies 1. Tanistry 32. b.]

[7. A custom in a town for a lord to enter into the lands of his tenant, till an agreement made for the arrears, when the tenant ceases for two years, is not good; for it is an ill usage to oust a man of his inheritance. 43 E. 3. 32. Curia.]

Fitzh. Custom, pl. 25. cites S. C. and Pasch. 43 E. 3. and per Cur. n

is not good to oust a man of his inheritance without answer; besides the usage was alleged to be in his will only, and not in the neighbourhood.——S. C. cited Arg. Bullt. 115.

[8. But if this custom had extended itself into many towns, it had been good. 43 E. 3. 32.]

Fitzh. Custom, pl. 15. S. C. & S. P.

seems to be admitted.——See supra, pl. 7. in the notes

[9. It

+ Fitzh.
Avowry.

* Fol. 560.

pl. 73. cites
S. C.

Br. Avowry, pl. 25. cites S. C. — Br. Customs, pl. 18. cites 14 H. 4. 2. S. P. — But 11 H. 4. 2. has no such point, and therefore Roll seems to be misprinted for 14 H. 4. 2.

[9. It is a good custom, that the tenants of the manor ought of themselves to choose a beadle to collect the rent and amercements of the manor, and * that if the beadle be not sufficient, that the tenants shall answer them to the lord. 44 E. 3. 13. 11 H. 4. 2. 11 H. 6. 52. b.]

[10. Also the custom is good, if it be besides what is before, that if the beadle elected by the tenants refuses to do it, that he shall be amerced, and that the lord may distrain him, till he hath found sureties to perform his office, though the tenants are to answer for him. 11 H. 6. 52. b.]

Issue was
taken upon
the custom,
that the te-
nants should
have them to the fold, and not the lord, prout, &c.

11. It is a good custom, that the lord of the town shall have to his fold the sheep of strangers, which come upon the land of his tenants, and not the tenants. 46 E. 3. 13.

Br. Customs, pl. 8.

Fitzh. Brief,
pl. 599. cites
S. C. but
S. P. does
not appear.

[12. It is a good custom, that when a man hath agisted his cattle in my park, in the time of a great snow, for necessity to cut the branches of the oaks for them. 46 E. 3. 12. b. admitted; but such usage is not sufficient, unless it hath been time out of mind, &c.]

And the
whole
Court held,
that this is
not custom,
but extor-
tion;

[13. It is not good custom in a leet, that if the petit 12 make any false presentment, and it is found false by the grand inquest, that the petit 12 shall be amerced; for this is against common right, and extortion. 9 H. 6. 44. b. Curia.]

for the verdict of the one 12 is intended in the law to be as good as the verdict of the other 12. Br. Customs, pl. 3. cites S. C. — Fitzh. tit. Custom, pl. 1. cites S. C.

Br. Cul-
toms, pl. 3.
cites S. C.

[14. But it is a good custom, that if they conceal any thing that ought to be presented, that they shall be amerced. 9 H. 6. 44. b.]

— Fitzh. Custom, pl. 1. cites S. C.

Br. Pre-
scription,
pl. 98. cites
S. C. The
Prior of
Dunstable's

[15. It is a good custom, that every man of the town that hath an house next adjoining and abutting to the High-street, may sell all merchandizes in his shop within the said house, in the time of the market which is held in the High-street. 11 H. 6. 19. b. 25.]

Case the prescription was held ill. Afterwards the defendant prescribed the custom of the vill to be, that every burgess seised of any house adjoining to the High-street, may sell in his own house, and that he is a burgess, and was seised of a house adjoining to the High-street, and sold, &c. — 8 Rep. 127. a. cites S. C. and held, that the defendant pleading himself to be a householder within the said vill, and prescribed as such, was not good, &c.

4 Le. 299.
pl. 382.
Glascock's
case, S. C.
& S. P. adjudged.

[16. It is a good custom, that a copyholder in fee may cut down trees, and sell them at his pleasure. P. 6. Ja. B. between Glascock and Peche.]

* Cro. Car.
220. 221.
pl. 7. Roc.

[17. But otherwise it is of a copyholder for life. P. 6 Ja. B. Tr. 7 Car. B. R. between * Rooke and Huggins, adjudged, upon a special

a special verdict per totam Curiam, where the cutting of elms by a copyholder for life, by such custom was adjudged a forfeiture, and cited † Powell and Peacock, adjudged. Hobert's Reports 16. said by Warburton to have been lately adjudged.]

1st. Cur. † Cro. J. 29. S. C. adjudged. — S. C. cited Cro. C. 221. and the precedent shewn to the Court. — Noy. 2. cites S. C. — S. C. cited a Brownl. 89.

[18. [But] It is a good custom, that a copyholder for life, who by custom may name his successor, may cut timber trees, and convert them at his pleasure; for he is quasi a copyholder in fee. Tr. 10 Ja. between Rawles and Mafon, per Curiam.]

a Brownl. 85 to 91. S. C. argued by counsel, and ibid. 192. to 203. S. C. debated by the Court, and judgment for the defendant that the custom was good. — S. C. cited Cro. C. 221. in pl. 7. by Croke J.

19. Where a custom is, that every tenant of the manor, who distrains for damage feasant in his manor shall impound in the park of the lord, or shall be amerced, this is no good custom; for the lord is not damnified. Br. Customs, pl. 31. cites 21 H. 7. 20. per Fisher and Kingsmill.

20. So where tenants make a law that each parishioner shall pay annually to the church such a sum, and if not that he shall forfeit to the lord 20d. this is no good custom or reasonable law; for the lord is not damnified by this non-payment, nor is he to take profit by it. Ibid.

21. Contra if he was to forfeit 20d. to the church wardens, &c. and per Pollard it is a good prescription, or custom, that the tenants of the manor near shall not fish, unless in the lord's boat; for the lord is at charges in reparation of the boat, and so he is by reparation of the park or pound, which Kingsmill denied. Ibid.

22. A custom was to have so much per ton of every ship which came in to W. &c. It was objected, that a tun of some merchandizes was not worth so much as they claimed to have for the custom, yet it was adjudged good. Arg. Sid. 18. cites Mich. 20 Jac. Rot. 3009. Napper v. Manfell.

23. A custom to elect a canon to succeed in the next vacant place, there being no vacancy at the time, was held to be ridiculous, and a mandamus was denied. 2 Jo. 199. Pasch. 34 Car. 2. B. R. Dr. Owen v. Dr. Stainhow.

(F) What Things may be done by Custom.

[1. IT is a custom, that when one goes to plough, that he may turn his plough upon the land next adjoining, be it sowed or not*. 22 E. 4. 8. b. adjudged; but † 21 E. 4. 28. b. dubitatur.]

good justification in trespass for subverting the soil, and feeding the grafs by a custom, that he may turn his plow upon the land next adjoining, by which he so did, and his horses in the turning subverted a foot of land, and took a mouthful of grafs contra voluntatem farm, and well. — S. P. Dav. 30. 2. Arg. in the case of Tassilry, and ibid. 32. b. cites 21 E. 4. 28.

† Br. Customs, pl. 51. cites S. C. and that the custom was admitted good, but says nothing of its

key v. Huggins, S. C. adjudged. — Jo. 245. pl. 2. S. C. resolved per Brownl. 132, 133. Rolls v. Mafon, S. C. adjudged. —

its being good in case the land be sown; but that he may do it if the land be not sown with grain. And per Cur. he shall say, that it has been used time out of mind, but shall not say, quod licebit.

[2. It is a good custom to dry nets upon the land of another man, in favour of fishing and navigation. Davies 1. Tanistry 32. b.]

* Br. Customs, pl. 51. cites S. C. and S. P. by Littleton. † Br. Customs, pl. 12. cites S. C. — Fitzh. Custom, pl. 10. cites S. C. — S. C. cited per Cur. 5 Rep. 84. a. b.

Br. Customs, pl. 9. cites 46 E. 3. 23. that the custom is, that none shall put in his beasts after the corn cut and carried away, till Mich. and because the plaintiff put his beasts in, he took them, and said, that he is lord of the soil; and the other said, that the usage extends as well to the lord as another person, and the other e contra. — 48 E. 3. 23. has no such point.

* [184]

Fol. 661.

See tit. Heriot (G) (H)

* S. P. For it cannot have a lawful commencement. Br. Customs, pl. 38. cites 21 H. 7. 40. — Ibid. pl. 75. cites S. C. and Fitzh. tit. Prescription, pl. 67. — Br. Prescription, pl. 40. cites S. C. and same diversity. — Fitzh. Prescription, pl. 67. cites S. C.

† Br. Prescription, pl. 106. cites S. C. and same diversity.

[5. It is no good custom, that the lord of the manor shall detain a distress taken upon the demesnes, till a fine at his will paid for the damage. Lit. 46. Davies 1. Tanistry 33.]

[6. A custom, that the lord may take for his heriot the beast of a stranger, levant and couchant upon the land of the tenant, is not good. D. 3. El. 199. Davies 1. Tanistry 33.]

[7. A custom, that the lord of the manor shall have 3d. [3d.] for a pound breach of every stranger, is not good*. 21 H. 7. 40. Da. 1. Tanistry 33†. 11 H. 7. 13, 14. But is good against the tenants of the manor. 11 H. 7. 13.]

[8. Where by a custom the homage of the manor hath used time out of mind to make by-laws for the better ordering the tenants of the manor, touching their common, under a pain, it is a good custom, that the lord of the manor hath used time out of mind, &c. to distrain the cattle of him that broke the by-laws, for the penalty in any place within the manor, though it be within the proper soil of the lord, or others, and not in the lands of the offender, for this is not issuing out of the land. D. 15 El. 322. 23. adjudged; but there 24 moved again in another case.]

9. It was said, for law, that by no custom can bailiff or steward lease frank tenement; per Cur. contra of copyhold, as it seems, if it be taken in Court according to the custom of the manor. Br. Customs. pl. 33. cites 19. Aff. 9.

10. The custom of York is, that a feme covert may take land purchased

traded by her baron, of the gift of the baron, and that if the baron discontinues and dies; and the feme does not claim within the year and day she shall be barred. Br. Customs: pl. 56. cites 12 H. 3. and Fitzh. Prescription, 61.

11. Of every custom there are two essential parts, viz. time and usage; that is, time out of mind, and continual and peaceable usage without lawful interruption. Co. Litt. 110: b.

12. That may be good by custom without consideration, which will not be good by prescription without consideration, as custom to turn his plow upon the head-land, and so for fishermen to dry their nets upon the land of another, and so to dig the lands of others to make bulwarks in time of danger, &c. because those things are pro bono publico. 3 Lev. 307; 308. Trin. 3 W. & M. in C. B. in the case of *Simpson v. Bithwood*:

(G) *What shall be against the law of Reason.* [185]

[1. IT is a good custom; that the corporation of Litchfield have had a market there time out of mind, &c. and that the corporation ought to repair the way to it, and to appoint a bellman that ought to sweep the market-place, and in recompence thereof, the said bellman time out of mind, &c. from those that brought their grain to the said market, and untied their sacks, there to sell it, had used to take a pint of grain, if it was but one bushel or under, but if it was above a bushel, then a quart, to the use of the said corporation; this is a good custom, for the men that are charged by it have a reasonable benefit thereby. P. 11 Ja. B. R. between Hill and Hawkes; & Tr. 12 Ja. B. R. adjudged.]

custom toll is not due of common right of corn brought in only and not sold:—*Hill v. Hanks*, S. C. and the custom adjudged good:—*Roll. Rep. 1. S. C. adjournatur*, *Ibid. 44. pl. 12. S. C. adjudged the custom good.*

[2. It is a good custom, that the corporation of Gravesend have used time out of memory to maintain a barge for passengers between Gravesend and London, and that no foreigner ought to carry any person from Gravesend to London, without licence of the company of watermen of Gravesend. M. 5 Ja. B. R. between Plincocks and Sanders; adjudged upon evidence at the bar.]

the Court.———S. C. cited Arg. *Raym. 327.*

[3. It is a good custom; that where the Bishop of Sarum was seized in fee, in the right of his bishoprick, of certain mills within the city of Sarum, that all the inhabitants resident within the city in any ancient messuage held of the said bishop, have used a tempore, &c. all their grain by such inhabitants in their said houses spent; at the said mills, and not elsewhere; without licence, &c. to grind, and pay for the said grinding; and in consideration thereof, the bishops, a tempore, &c. have used to keep servants, &c. to grind, and loaders to carry, &c. for here are mutual considerations; and mutual

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actions

Mo. 833;
pl. 1124.
Hill v.
Hawker. S.
C. and the
custom ad-
judged
good,
though the
corn was not
fold, but
brought in
to be fold;
but without
a special
Bull. 201;
Roll. Rep. 1. S. C. adjournatur;
a Brownl.
177. Pasch.
1612. id
Jac. C. B.
Gravesend's
case. S. C.
argued by
counsel, and
debated by
Hob. 189;
pl. 233.
Trin. 14
Jac. S. C.
—S. C.
cited Sty.
421. in case
of Kemp v.
Gord. —
Hard. 67;
88. Trin.
1658. in the
Exchequer;

Vaughan v. Mansel. S. P. and cites S. C. but the Ch. Baron, and Parker held, that such customs must have a reasonable intendment, viz. that all such corn as is ground, must be ground there. — 134. 117. Parker v. Cur. v. B. R. Per, Division in case of Cony-ton and Litheby, that according to such allegation, the defendant cannot spend any corn in his house, unless it be first ground, and so he cannot feed any chicken, or give any corn to his horses, or make surmetty, (as he said) with it, unless it be ground; and therefore it was unreasonable; and judgment accordingly. — Vent. 167. Mich. 23 Car. 2. B. R. the S. C. adjudged. — 12 Lev. 119.

Litheby v. Cony-ton. S. C. and Division is said, that the declaration should have been, that they ought to grind all the corn which is ground and spent within their houses, and not all corn spent there; for corn may be spent without being ground at all, as for horses, swine, poultry, &c. and judgment accordingly. — 12 Lev. 119. cites S. P. held accordingly, Mich. 1654. Almay v. Jacon.

[186] [4. But such custom is not good, if it extends to grain sold in his house, to restrain such inhabitant from selling grain in his house, without grinding thereof. Hobert's Reports, 256. between Harbin and Green, adjudged.]

* Fol. 562.

Hob. 189.

pl. 593. This is S. C. adjudged, and Hobart Ch. J. held, that if he had assented the breach only in corn spent, yet it would not have served, because the custom itself being inure, it is totally void though some part of it alone might be good in law. — Mo. 88. pl. 1247. S. C. adjudged.

5. An usage by ten years is good custom by the ecclesiastical law. Per Doderidge J. Roll. Rep. 419. 14 Jac. B. R. in case of Gollin v. Harden.

6. Custom to charge another's inheritance for a thing, and preservation of it, is good. Sid. 161. pl. 16. Mich. 15 Car. 2. B. R. Smith v. Barret.

7. Custom for those that govern the common to inclose to their proper use. Sid. 162. Mich. 15 Car. 2. B. R. in case of Smith v. Barret; per Windham J. who said it was the custom in Knightmore in Somerset.

8. The mayor and commonalty of London declared on a custom, that they and their predecessors have had of every messuage of a messuage 8d. per ton, for every ton of cheese brought from any place in England to the port of London, from the east of London-bridge, in the name of weighage, and that the defendant being master of a ship, brought thither so many ton, &c. Adjudged; that the liberty of bringing goods into a port for safety, imports a consideration in itself; and so a judgment in B. R. was affirmed in Carr v. Seac. 3 Lev. 37. Mich. 33 Car. 2. London (mayor and commonalty) v. Hunt.

(H) What shall be good Customs.

A copyholder by custom may name his successor,

and if the lord refuse to admit him, the homage may let a reasonable fine, and so he shall be admitted.

[1. IT is a good custom, that a copyholder for life may name him that is to succeed him. Term 10. Jac. between Rawles and Mason, per Curiam.]

mitted. Brownl. 137. Rolls v. Mason, S. C. ——— a Brownl. 85. S. C. argued. And ibid. 892. &c. S. C. & S. P. agreed to be good.

[2. Jurata presentat, quod est quedam consuetudo in hundredo de Mid' in Kancia, quod si quis in adulterio prolem genuerit, & ipse inde non possit se acquietare per legem suam, aut recognovit factum, ita quod convictus sit, quod ipse forisfaciet omnia bona & catalla sua domine regi; & per hanc consuetudinem ballivus regnæ seiscivit omnia bona ejusdem adulteri, pro quorum captione nunc presentatur, & fatekur quod talis habetur consuetudo in placitando hic. Mich. 21 E. 3. B. R. Rot. 10.]

[3. It is a good custom, that an estate of freehold and inheritance hath used to pass by surrender, without the assent of the lord in his court, by delivery over by the bailiff to the feoffee, according to the form of the charter, to be inrolled in court, or such like. Co. Lit. 59. b.]

[4. If the lord of a copyhold by custom claims to have a fine of the copyholder, upon every alteration of the lord, be it by alienation, or otherwise, this is a void custom as to the alteration, or change of the lord, by the act of the lord himself, for by such means the copyholders might be oppressed by the multitude of fines by the act of the lord. Co. Lit. 59. b.] [187]

[5. But it is a good custom, that the copyholder hath used to pay a fine upon the alteration of the lord, by the act of God, as by death of the Lord. Co. Lit. 59. b. where is cited a case to be resolved upon a reference out of Chancery. Trin. 39. El. Arm-Strong's case.] S. C. cited Arg. Het. 127.

[6. [Sp.] It is a good custom, that a copyholder hath used to pay a fine upon every alteration of the tenant, be the alteration by the act of God, or the act of the party. Co. Lit. 59. b.] S. C. cited Het. 127. Arg.

[7. It is a good custom, that a man * that hath a ferry over a river, &c.] * It seems the word (that) should be omitted.

[8. A man may prescribe or allege a custom, to have solam, vesturam terræ from such a day to such a day, and by this the owner of the soil shall be excluded from feeding there. Co. Lit. 122.] See Tit. Prescription (L) pl. 6, 7, and the notes there.

[9. So a man may prescribe to have separalem pasturam of such land, and exclude the owner from feeding there. Co. Lit. 122.] See Tit. Prescription (L) pl. 6, 7, and the notes there.

10. In the Isle of Man is a custom, that if one steals a horse he shall not be hanged, but shall be fined and go quit, because the owner may have his horse again, for he cannot be eaten; but if one steals a hen or a capon, &c. he shall be hanged; for it shall be intended that it was taken to be eat, and so the owner could never have it again. This is a good custom. Mich. 35 H. 6. 37. b. 28. a. per Needham. Br. Customs, pl. 6. cites S. C. — 4 Inst. 285. cap. 69. cites 12 H. 8. 5. a. that if a man steals a horse or

an ox, it is no felony; for the offender cannot hide them, [it is said in the margin, that they have no woods there] but if he steals a capon, or a pig, he shall be hanged, &c.

There are several customs that are good *ratione loci* which are not allowed throughout England; as the case of *feme sole merchant* in London; and the custom of the Ille of Man to *hang* for stealing a capon, but not an ox. Sid. 267. pl. 18. Arg. cites 12 H. 6. 5.

11. A custom that a *lessee for years shall hold for half a year beyond his term* is not good; agreed by all the justices. So a custom that a *lessee for life may leave par auter vie* is not good; per Hales & Mountague. Mo. 8. pl. 27. Hill. 3 E. 6. Anon.

12. Custom to have an *heriot of the purchaser* of lands within the manor, if the copyholder, the vendor, has no live beast, was adjudged a void custom. Bendl. 302. pl. 295. Trin. 13 Eliz. Lyne v. Bennet.

13. A custom was found by verdict, that copyholders may let for a year *ad pasturandum, not ad colendum*. Le. 16. pl. 19. Pasch. 26 EH. B. R. in the case of Cham v. Dover.

14. Where *common-law and custom meet*, and so that of necessity one must have the preference and stand, the common-law shall be preferred, and take place before the custom; as rent charge granted out of land at common-law and borough-English, &c. this rent descends according to the common-law. And. 191. pl. 226. Mich. 27 & 28 Eliz. in case of Smith v. Lane.

15. Custom cannot be good *against a statute*. Cro. E. 85. pl. 4. Hill, 30 Eliz. B. R. Griffin v. Wood.

[188] 16. In Kent there is a custom, that *if the free-tenants of a castle do not pay their rent they shall lose the lands bolden of it*; and the custom of *Lidford-castle in Com. Devon*, is, that a freeholder of inheritance may not pass his freehold, unless by surrender into the hands of his lord. Sic dictum fuit. 5 Rep. 84. b. Trin. 41 Eliz. C. B.

17. Every custom ought to have *four inseparable qualities*. First, it ought to have a *reasonable commencement*, {for quod ab initio non valuit tractu temporis non convalescet, & consuetudo ex certa causa rationabili usitata privat communem legem. Secondly, it ought to be *certain and not ambiguous*; for incerta pro nullis habentur. Thirdly, it ought to have *continuance, time out of mind without interruption*; for consuetudo semel reprobata non potest amplius induci. Fourthly, it ought not to *exalt itself upon the prerogative of the King*; for nullum tempus occurrit regi.) Dav. 32. a. to 34. a. Hill. 5 Jac. B. R. The case of Tanistry.

All customs ought to have a reasonable intentment, as if a custom be for an infant to make a feoffment, infant tenant in tail cannot do it; per Eyre J. Show. 84. cites Roll. 567. Yelv. 1. and Cro. E. 879. Remainder-man not bound by the custom, because it must be taken strictly. Ibid. and cites 8 Rep. Letchford's case.

18. Customs ought to be *reasonable*, and if they are generally *inconvenient* they cannot be reasonable, and if they are generally inconvenient, though not *mischievous*, yet they are not good. Arg. and agreed per counsel of both sides. 2 Brownl. 87. Pasch. 9 Jac. C. B. in case of Rowles v. Mason.

19. A custom was alledged in the town of J. *to elect every year two burgeses, who used to make a feast*, such a day, and the defendant being elected burges refused to make that feast, for which he was *fined 20l. and imprisoned till he paid it*. It was holden by

the Court to be a good custom, and well returned, and the prisoner remanded. Cro. J. 555. pl. 17. Mich. 17 Jac. B. R. Wallis's case.

20. Custom, that if a copyholder leases for a year, without licence, and dies within the year, it shall be void against the heir, is a good custom. Het. 126. Mich. 4 Car. C. B. Turner v. Hodges. Litt. Rep. 233. S. C. adjudged. — Hunt. 101. S. C.

adjudged; but a custom, that if the copyholder had surrendered to the lord that the lease should be void, had been a bad custom, because he might subvert and destroy, by his own act, the same estate which he himself had made.

21. A custom in the duchy of Cornwall, that in the same lands, an estate in fee should descend to the younger son, according to the nature of borough-English; but an estate in tail to the heir at common-law, and held good per tot. Cur. (absente Crooke.) Mar. 54, 55. pl. 82. Mich. 15 Car. Anon.

22. Tis a good custom to distress the under-tenant, for amercia-ment laid on the tenant for not repairing his copyhold. Mar. 164, pl. 231. Hill. 17 Car. Thorne v. Tyler.

23. Custom, that if a man comes upon my land that I may beat him, or if he puts my goods into his house, that I shall burn his house, are not lawful customs. Br. Customs, pl. 5. cites 35 H. 6. 25.

24. That cannot be called a custom, which is grounded upon fraud. Chanc. Cases 30. Mich. 15 Car. 2. Borr v. Vandall. Nelf. Chan. Rep. 87. 88. S. C. & S. P. per Cur.

25. Custom of the manor of Taunton, that the wife of copyholder shall have the inheritance of the baron, and if she marry a second husband and die, second baron shall have all the inheritance. Cited by Windham J. Sid. 267. pl. 18. Trin. 17 Car. 2. B. R. in Newton's case.

26. Every custom supposes a law, and if it be not irrational, and entertains no contradictions, it is good; per Vaughan Ch. J. Freem. Rep. 64. pl. 76. Mich. 1672, in case of Collierd v. Jackson. The case was, in an action for false imprisonment,

the defendant justified by a custom in the city of Carlisle, that if a person be sued in an action of covenant,* and any other person be bail, that if the principal do not pay the damages that are recovered against him, &c. that the bailiffs have used to take the bodies of such bail, &c. And shews, that an action of covenant was brought against J. S. and that a recovery of 39l. in damages was had against him, and that the plaintiff was bail, and thereupon a capias was sued out against the principal, and returned non est inventus; and thereupon a capias was sued out against the bail, by virtue whereof he arrested him. Vaughan said, if an act of parliament were made, that if the principal do not pay the money the bail should be taken without any capias sued forth against the principal, no man would doubt but it were good. Freem. Rep. 63, 64. pl. 76. Mich. 1672. Collierd v. Jackson.

*[189]

27. All customs are to be taken strictly, when they go to the destruction of an estate. 3 Mod. 224. Trin. 4 Jac. 2. B. R. by Eyre J. in case of King v. Dilliston. S. P. Yelv. 1. in Baf-pole's case — S. P. Le. 1. in

case of Bornford v. Packington. — S. P. Arg. Cart. 83. in case of Smith v. Paynton, cites the same cases, and S. P.

28. Holt Ch. J. cited a case of Malden in Essex. The corporation there prescribe in a que estate, that they, and all those, &c. time whereof, &c. have used to repair the port, in consideration whereof,

whereof, they have used time whereof, &c. to receive for all lands, sold within the precinct of the borough, a certain rate of 10 in the pound, out of the purchase money; and it was adjudged a good custom; and this is what they call (*land-cheap*;) for the landholder reaps a benefit by the trade coming to the town, by reason of the port. *Ld. Raym. Rep. 386. Mich. 10 W. 3. Vinkensterne v. Ebden.*

Yes if no reason can be given for the beginning of a custom, non sequitur that the custom for that cause is unreasonable, and was against reason in the beginning, for there are some things for which no reason can be given, as borough English and gavelkind; per Coke Ch. J. 3 Bull. 196. *Hill. 11 Jac. B.R. in case of Hix v. Gardiner,*

29. The reasons by which a custom is supported, are generally these. First, because the party that is bound by it, has benefit by it. Secondly, that the party that claims the advantage of it, is at charge by reason of it. Thirdly, that it may have a reasonable commencement, or suppress fraud, and the two first of these reasons hold in the case of toll travers and toll-thorough. *Arg. 6. Mod. 124. Hill. 2 Ann. B. R. in case of Cuddon v. Eastwick.*

30. A custom which may be general, and extend to all the subjects in England, and is not warranted by, but contrary to the common law, is void. *Gibb. 51. Pasch. 2 Geo. 2. B. R. Sherborn v. Bostock.*

(I). Against the Law of the Land.

[1. EVERY custom against the maxims of the common law is not void. *Davies v. Tanistry 30.*]

Br. Customs, pl. 68. cites S. C. Fish. Prescription, pl. 30. cites S. C.

[2. For it is a good custom, that a feoffment of tenant in tail with warranty, shall not be a discontinuance. 30 Ass. pl. 47.]

[3. It is a good custom, that a woman shall not have dower, where she received, during the coverture, part of the money for the sale of the land. 20 E. 3. Brook Customs, 53.]

* [190]

4. It is a good custom, that if a man marries a widow, she shall not have dower. *Kitchin 149. Da. 1. 30. b.*

Fol. 562.

* [5. But a custom, that the wife of tenant in fee shall not be endowed, is not good. *Da. 1. Gavelkind 49. b.*]

[6. A custom, that the wives of Irish lords, or captains, ought to have the sole property in certain parts of the goods during the coverture, with power to dispose of them without the assent of the husband, is not good, because it is against the common law. *Da. 1. Gavelkind.*]

Br. Customs, pl. 21. cites S. C. Ibid. pl. 74. cites S. C.

[7. It is a good custom, that if a man be seised of land for 40 weeks, though without title, he shall not be ousted by entry without action. 21 E. 3. 46. b. adjudged.]

Jour. 21. pl. 40. cites S. C. and says, that this is a good custom.

* Br. Customs, pl. 29. cites 14 H. 4. a. S. C. says, it is admitted, that

[8. A custom, that the tenants of an honour shall pay for every alienation a fine to the lord, is not good, because it is against the law, that any should make fine for an alienation but the King's tenants. * 14 H. 4. 3. But quære thereof, for if it were against

against reason, the law would not allow it the King. Contra [14 H. 4. 1.] such a custom to have a fine for alienation is

a good custom, but that he ought to allege scisin, &c. and ought to shew what fine certain he shall have, per optimam opinionem, and that such custom ought to be shewn to be allowed in cyre, per Cur. because it is against common right. — Fitz. Customs, pl. 12. cites S. C.

[9. Customs, pl. 17. Hank J. said, that in several places there is a custom, that frank-tenant when he is seized in fee, when he will alien, shall come into court and surrender the land, and the alienee shall make fine, and if he does not, the lord may seize for the alienation.

[9. A custom against common right, is not good. 7 H. 6. 32.]

[10. A custom is not good, that trenches in prejudice of the whole realm. 7 H. 6. 32.]

[1. 2] As to Proceedings in Inferior Courts. In what Cases not good.

[11. It is not a good custom of a court to award a *capias* in an action of debt, or other such writ, before any summons awarded, for this is against the course of the common law, and all courts. Pasch. 3 Jac. B. R. between Banks and Pembleton, in a writ of error. Pasch. 5 Jac. B. R. between + Ballard and Cooke, the which intratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between † Moyle and Catchmed, adjudged, which intratur, Trin. 4 Jac. Rot., 1609.] * See Tit. Process (D) pl. 1. a. S. C. and the notes there. † See Tit. Error (L. b.) pl. 6. and (G. c.) pl. 4. S. C.

‡ See Tit. Error (L. b) pl. 6. and (G. c) pl. 4. S. C.

[12. It is a good custom in London, that the mayor, recorder, or any alderman, being a justice of peace, may take depositions of any person produced before them, in perpetuum rei memoriam ex parte alicujus persone, and that such depositions shall be recorded there in perpetuum rei memoriam, and that these depositions so taken, for any persons there given in evidence, shall be good evidence to a jury, to induce the consciences of any, and to enforce the truth. This is a good custom, though these depositions may be taken in perpetuum rei memoriam, without any suit depending contra. Hill. 32 El. B. R. between Kinnersby and Cooper.] Cro. E. 168. pl. 5. Kinnersby v. Cooper, S. C. but because it was not alleged, that London is an ancient city, the declaration was not good; for it is a thing traversable, the action

being grounded upon it, and therefore adjudged for the defendant. — De. 98. pl. 120. Rymerby v. Cooper. S. C. and adjudged against the plaintiff for the said declaration, the declaration.

[13. It is not a good custom in London, that if a man becomes bail for another in an action there, and the plaintiff recovers against the principal, and sues out a *capias* against him, and the sheriff returns non est inventus, that presently upon this return, without any *scire facias* against the bail, the bail may be taken in execution upon his recognizance; for this is against the law and reason, inasmuch as if he had sued his *scire facias* against the bail, they might have pleaded the release of the plaintiff, or death of the principal, &c. Trin. 32 El. B. R. between Devered and Katcliffe, adjudged.] [191] Cro. E. 185. pl. 7. S. C. The custom adjudged unreasonable. — a Le. 29. pl. 33. S. C. adjudged accordingly.

fy.—Cro. C. 581. pl. 5. Mich. 15 Car. B. R. Anon. S. P. as to the city of Westminster. 5 Mod. 95. S. P. per Gur. obiter; but said, that this custom cannot be supported by reason, and though the customs in London are confirmed by act of parliament, yet such customs which are contradictory to reason, and to the principles of the common law, shall not be allowed in B. R. 5 Mod. 95. Trin. 7 W. 3. — Jenk. 83. pl. 6a. S. P.

[14. So it is not a good custom in an inferior court upon a judgment in the same precept, in nature of a *capias ad satisfaciend.* to give a warrant to the bailiff to take the principal in execution, if he may be found, and in his default to take the bail; for this is against the law to take the bail before a *capias* returned against the principal, and *scire facias* against the bail, Hill. 10 Car. B. R. between Seaborne and Savaker, per Curiam, upon demurrer. Intratur, Trin. 10 Car. Rot. 572.]

† See Tit. Trial (R. c) pl. 1. and the notes there.

† Fol. 564.

[15. It is not a good custom in an inferior court (which is not within the statute of 32 [35.] H. 8. to grant a *tales de circumstantibus*, because this was against the law. Pasch. 16 Jac. B. R. between * Goodyear and Elvin, dubitatur. Mich. 11 Car. B. R. between Cowpland and Burnet, adjudged † in a writ of error, upon a judgment given in the liberty of the dean and chapter of York, and the judgment reversed accordingly. Intratur, Hill. 10 Car. Rot. 1195.]

[16. It is a good custom in an inferior court, that when any man comes to the grand distress in any plea, and it is returned that he is distrained by his goods, & *quod nihil habet ulterius per quod distringi potest*, that his goods shall be delivered to the plaintiff, finding security, that if the suit passes for the defendant, that he shall have again his goods, and that, if it pass for the plaintiff, that he shall have them. Mich. 13 E. 3 B. R. Rot. 160. in Maidstone in Kent, in the court of the archbishop.]

Cro. C. 159. pl. 3. Tredinnock v. Perryman. S. C. adjudged, that the custom was void; and Jones J. said, that

though in some parts of Wales there are such trials by six only, that is by reason of the statute of 34 H. 8. which appoints, that such trials may be by six only, where the custom hath been a custom to try by six jurors, unless it be in Wales, where it is confirmed by act of parliament, or to take execution of body and goods, is a void custom. Sid. 233. pl. 36. Mich. 16 Car. 2. B. R. Aike v. Hinkun.

[18. It is a good custom in the county-palatine of Chester, that if judgment be there given in a base court, and thereupon a writ of error is brought before the chief justice there, and he reverses the first judgment, to give costs to him at whose suit it is reversed. Trin. 9 Car. B. R. between Foden and Maddock, intratur. [192] Pasch. 8 Car. Rot. 397. admitted in a writ of error, where it was certified as a custom, and agreed per Curiam, to be a good custom.]

[19. It

[19. It is a good custom in an inferior court, that in an action of debt, if the defendant does not deny the debt, but petit quod inquiratur de vero debito secundum consuetudinem, that a jury may be returned, that shall try it, and if they find it to be a true debt, that the plaintiff shall have judgment thereupon. Mich. 11 Car. B. R. between Smith and Watson, adjudged in a writ of error upon such judgment in Norwich, and the first judgment affirmed accordingly. Intratur, 10 Car. Rot. 676.]

Error of a judgment in N. in debt upon obligation, where the defendant confessed it to be his deed, but according to the custom

there prayed quod inquiratur de debito; a precept was awarded to make an inquest, which was returned, and found to be a sum certain, for which the plaintiff had judgment; this was assigned for error, but because it was done according to custom, it was not reversible, and the judgment was affirmed. Cro. E. 894. pl. 12. Trin. 44 Eliz. B. R. Grice v. Chambers. — An action of debt was brought upon a bond in an inferior court; the defendant cognovit actionem & petit quod inquiratur per patriam de debito. This pleading came in question in B. R. upon a writ of error; but was maintained by the custom of the place, where, &c. Hales said, that it was a good custom; for perhaps the defendant has paid all the debt but 10l. and this course prevents a suit in Chancery. And it were well if it were established by act of parliament, at the common law. Mod. 96. pl. 1. Mich. 25 Car. 2. B. R. Anon.

[20. If there be a custom in an inferior court, that if a man brings an action against another there, and the defendant appears, and pleads to issue, and at the day of trial, the defendant being solemnly called, does not appear, nor find pledges, qui cum manucapere voluerint, to have his body from court to court, at every court thereafter to be held, till the plea be determined, as he ought by the custom, but in contempt of the court, recessit & defaultam facit, and judgment is thereupon given; yet this is not a good custom, but utterly unreasonable; but they ought, according to law, to take the inquest by default; for if he had appeared, and staid in prison without finding pledges, yet they ought not to have given judgment against him, if he would have pleaded to issue. Trin. 11 Car. B. R. between Burges and Sparke, per Curiam adjudged, and such judgment given in Plymouth reversed accordingly. Intratur Hill. 12 Car. Rot. 576.]

[21. It is a good custom in Bristol, in the court of Tolly there, held before the sheriffs and bailiffs of the city, to maintain an action upon the case, upon a concessit solvere, scilicet, that the defendant concessit solvere to the plaintiff 60l. pro diversis denariis summis eidem querenti per defendantem prius debitis solvendis; though this is not good at common law, and though a man cannot beforehand know upon what contract this is brought till it comes to trial. Mich. 15 Car. B. R. between † Orchard and Jenkins, per Curiam, in a writ of error out of Bristol, where this was assigned for error, that it was against the law, as to this matter, but reversed for another cause, and the judgment affirmed accordingly. Intratur, Mich. 14 Car. Rot. 194. and so adjudged in a writ of error upon a judgment in Bristol. Hill. 11 Car. B. R. Rot. 1238, 1239, in two actions between Lawford and Cooke, and the judgments affirmed accordingly.]

† Sty. 128. Trin. 1630. Oreswick v. Armory. S. P. and seems to be S. C. and judgment affirmed; for the Court said, that debt

* Fol. 563.

will lie by a custom on a concessit solvere; though it

will not if brought by an executor. — Sty. 128. Hill. 1649. B. R. Paschall v. Sparing. S. C. cited a Ld. Raym. Rep. 1432. Mich. 13 Geo. B. R. in case of Story v. Axxns, in which it was held in an action brought in London, that the custom need not to be set forth at large in an assumpsit solvere, any more than in a concessit solvere, in which case it has been adjudged,

adjudged, the custom need not be set forth at large, but that, declaring *secundum consuetudinem*, &c. was sufficient; and cited 4 L. 195. Mich. 29 Eliz. B. R. *HOUVER'S CASE*. And Fox, to whom J. said, it had been not long since adjudged in this court, in case of *STAVANS v. BRITLAND*, that there is no necessity to set out the custom at large in a concessit solvere, &c. but that laying it *secundum consuetudinem*, &c. is sufficient.

22. Trespass by J. against B. because the plaintiff is lord of the hundred and ought to distress for the King's duties throughout the hundred, that he distrained such a day for the King's duties, and the defendant made rescue, the defendant prescribed in custom in his manor, where, &c. that when any distress is taken there for debt of the King, or other cause, that he shall take it and put it into his park for three days, and if the offender, in this time, tenders amends, that he shall re-have his goods, and said, that the plaintiff's bailiff distrained for debt to the King, and his bailiff took it and put it into the park for three days, and demanded judgment *si actio*; and because it is only a bondage to the defendant to keep the distress, and no profit, and that such custom cannot bind the King without special grant of it, therefore by award the plaintiff recovered his damages, and the custom condemned. Br. Customs, pl. 20. cites 21 E. 3. 4.

23. A custom was alleged in the town of C. that if the tenant escape by two years, the lord should enter into the freehold of the tenant, and hold the same until he were satisfied of the arrearages, and it was adjudged a custom against the law of the land, so enter into a man's freehold in that case without action or award. 2 Inst. 46, 47. cites 43 E. 3. 32.

24. *Præcipe quod reddat*, where the custom is, that the heir shall have his land at the age of fifteen years, or may alien when he can measure a yard of cloth, yet in *præcipe quod reddat*, such heir shall have his age, and so it seems, that custom shall be taken strictly, and not extend to be ousted of his age in those points. Br. Customs, pl. 14. cites 11 H. 4. 29, 30.

25. A custom of a manor was found, that a feme covert might devise her copyhold lands to her baron, or to a stranger, by assent of her baron; the Court thought the custom not unreasonable. Mo. 123. pl. 268. Pasch. 25 Eliz. Anon.

S. P. of a gift to the husband; but the Court held the custom unreasonable, and it shall be intended, that the being sub potestari viri, did it by coercion. Fleetwood urged, that the custom might be good, because the gift was to be examined by the steward of the court, as the manner is upon a fine, to be examined by a judge; but to this the Court said nothing. — 3 L. 80. pl. 128. Pasch. 30 Eliz. C. B. *Skipwith's case*. S. C. adjournatus. — 2 And. 158. per Cur. cites 3 S. 3. It. North, where it was agreed, that such custom was not allowable by law.

26. In a writ of error by W. v. B. upon a judgment given in the court of the city of Bristol; the case was, that B. was plaintiff in the said court, against W. in an action of covenant, and defendant declared of a covenant made by word by the testator of W. with B. and declared also, that within the said city there is a custom, that *conventio vix tenus facta*, shall bind the covenantor, as strongly as the custom of if it were made by writing; and it was holden by the Court, that that custom doth not warrant this action, for the covenant binds by the custom the covenantor, but does not extend to his executors, and taken, be- a custom

a custom shall be taken strictly, and therefore the judgment was reversed. 2 Le. pl. 3. Hill. Eliz. B. R. Wade v. Bemboe.

cause the plaintiff did make mention in the

declaration of the custom; but because in the end of his plea he said, protestando se sequi quorundam secundum consuetudinem civitatis B. the same was awarded to be good; and the exception disallowed. Godb. 49. pl. 61. Mich. 28 & 29. Eliz. B. R. Acon. — Sey. 145. Mich. 24 Car. B. R. in case of Twigg v. Roberts, the Court said, that this custom has been allowed against the party that made the contract; but the doubt in the principal case is, whether it be good against an executor? For a concessit solvere it without any consideration, and Roll Ch. J. said, this custom breaks three rules of the law.

28. A lord cannot prescribe to have a fine of every tenant that marries his daughter without his licence, for it is against the freedom of a freeman, that is not bound thereto by a particular tenure. Hawk. Co. Litt. 211.

[194] But there may be a custom in a manor, that every

tenant that holds in bondage, the freehold being in the lord, shall pay such fine, though his person be free. Ibid. — Litt. 3. 209. and Co. Litt. 139. b. 140. a.

29. No custom can help that which is against common law, as where in case, the court of S. the S. the defendant made default, & habuit diem per consuetudinem villæ prædictæ, this is against law, it being an apparent discontinuance, and judgment there given was reversed. Cro. J. 357. pl. 15. Mich. 12 Jac. B. R. Peplow v. Rowley.

30. A custom was alleged in the Spiritual Court, that all those that dwell in such a house had used to find meat and drink for the church-wardens and the parsons, going in procession in Rogation week, at the said house; but the custom was held to be against law. Mo. 916. pl. 1301. Mich. 13 Jac. Reynolds's case.

31. Custom alleged, that he and all the occupiers of the said meadow-close have used fugare & refugare averia, from the meadow-close to the moor-close, and from thence to the court-close; this is a custom only to do a wrong and to not good, and judgment accordingly. 3 Bulst. 326. Hill. 1 Car. B. R. Turner v. Denning.

32. In the Borough Court of Southwark, a capias was awarded against the defendant, who was sued there as administrator, and devastavit returned upon him, and fieri facias was awarded against the bail, secundum consuetudinem; it seems admitted, that this custom is void; but the writ of error was abated, because the principal and bail joined in it. Palm. 567. Trin. 4 Car. B. R. Plaw v. Richards.

33. Trespass for taking beef; the defendant pleads a custom to chuse supervisors of victuals at a court-leet; that he was there chosen, and having reviewed the plaintiff's goods, found the beef to be corrupt, which he took and burned. The plaintiff demurs, for that the custom is unreasonable, and when meat is corrupt and sold, there are proper remedies at law, by action on the case, or presentment at a leet; and cited 9 H. 6. 53. 11 E. 3. 4. 6. and stat. 18 Eliz. cap. 3. But the Court held it good custom, and judgment was given for the defendant; the chief justice being

Mod. 200. pl. 23. S. C. adjudged Northcote.

being not clear in it. 2 Mod. 36. Trip. 27 Car. 2. C. B. Vaughan v. Wood.

3 Kob. 361.
pl. 37. S. C.
held ac-
cordingly,
and that
the security
should be
only for ap-
pearance,
and not for
the debt.

34. Trespass for taking his goods; the defendant justifies by virtue of four several attachments out of *Bloomsbury court*, and sets forth that the custom there is, *upon such attachment to detain the goods till the owner give security ad satisfaciendum the plaintiff de debito*. Resolved the custom was unreasonable. Freem. Rep. 321. pl. 400. Mich. 1674, B. R. Watton v. Parsons.

35. It is a general rule that customs are *not to be enlarged beyond the usage*, because it is the usage and practice that makes the law in such cases, and not the reason of the thing. Per Trevor Ch. J. Gibb. 243.

For more of customs in general, see *Custom*, and other proper titles.

(A) An *Action* brought there by the Custom.

* Cro. C. 486. pl. 11. Bower & Ux. v. Cooper, S. C. accordingly. + Sty. 229. Denton v. Harrison, S. C. accordingly. — Cro. C. 350. pl. 14. Hill. 9 Car. B. R. *Hart's case*, a procedendo was denied, and said, that an action lies not, but that she should sue for defamation in the Spiritual Court only. — Met. 107. pl. 284. Trin. 17 Car. B. R. Anon. a procedendo was granted, and said by the counsel, and agreed by the Court, that of late years many procedendos had been granted in the like cases in B. R. — Sty. 69, 70. Mich. 23 Car. *Innes v. Green*, S. R. adjournatur. — S. P. and procedendo granted by three Justices,

[1. AN action by the custom lies in London for these words *A* spoke of a woman *thou art a whore, and will play the whore for two-pence*, for in London such women shall be carted. M. 13 Car. B. R. between Bavoire and his wife, against Cooper, per Curiam, after an habeas corpus and procedendo granted, a superfeudas was denied; but the opinion of Berkeley was the contra, for that Co. 4. Oxford's case, is contra; and in this these precedents were cited, scilicet, between Bond and Watton, Trin. 8 Car. B. R. a procedendo granted for such words, and a superfeudas denied per Curiam; and the Court said in this case, that if a judgment be given in London in this action, a writ of error lies, in which the law may be decided; and therefore it is not reasonable to grant a superfeudas to hinder the suit there, Trin. 1650, between Penton and Harrison, adjudged per totam Curiam, and a procedendo granted accordingly, where the words were, *thou art a whore, and my husband's whore*.]

Justices, Hide Ch. J. *Stanning*. Raym. 84. Mich. 15 Car. 2. B. R. *Hawes v. Wheeler*. — Lev. 116. Mich. 15 Car. 2. B. R. *Wheeler v. Welch*, S. P. seems admitted, and seems to be S. C. — Keb. 578. pl. 40. S. C. adjournatur, *Haies v. Wheeler*. — A procedendo was granted: Carth. 75, 76. Mich. 1 W. & M. in B. R. *Watton v. Clerke*.

2. Debt, because the defendant was with him at table by seven weeks for 12d. the week, the defendant tendered to wage his law. Laicon said to the law, he shall not be received; for he was at table in London, where by custom he cannot wage his law for boarding. Per Littleton, this is no matter here. Per Billing, the action lies here, if he counts upon the custom. Br. Customs, pl. 43. cites 1 E. 4, 5.

3. As in *rationabili parte bonorum* here. Ibid.

4. Contra upon the custom of such a country. Ibid.

5. For where the custom is arising upon the land, this is allowable in every court, as gavelkind, borough English, and feme to have dower of the moiety, but for an infant to have portions of goods, this shall not be maintained in the court only where the custom is. Br. Customs, pl. 43. cites 1 E. 4, 5.

6. The same, that in debt a man shall not wage his law, where an alderman of London witnesses the contract; those customs shall be allowed in the places where they arise, but not in this court, or in another court, and therefore the law does not lie here. Br. Customs, pl. 43. cites 1 E. 4, 5.

7. All such customs pleaded in bar here are good bars here; but when the action shall be brought upon a private custom, this shall not be brought in bank, as debt in London against executors upon a simple contract, does not lie here, but it lies well in London; for there the custom is known, and yet such recovery had there, and pleaded here, is a good bar, quære; for the best opinion was, that the law lies well. Br. Customs, pl. 43. cites 1 E. 4, 5.

[196]

8. O. and J. were bound as sureties with one A. to B. who recovered against J. in London, and had execution against him; and now J. sued O. to have of him contribution to the said execution, ut uterque oneretur pro rata, according to the custom of London; O. removed the cause by privilege into B. R. whereupon came J. and prayed a procedendo; and because, upon this matter, no action lies by the course of the common law, but only by custom in such cities, the cause was remanded; for otherwise, the plaintiff should be without remedy. 2 Le. 166, 167. pl. 202. Pasch. 26 Eliz. B. R. *Offley v. Johnson*.

Mo. 136.
pl. 280.
(bis) Trin.
25 Eliz.
Anon. S. R.
and seems
to be S. C.
and a proce-
dendo was
granted.

9. Debt in B. R. upon a recognizance acknowledged to the chamberlain of London, according to the custom for orphanage money, adjudged per tot. Cur. to be well brought in B. R. Cro. E. 682. pl. 13. Trin. 41 Eliz. B. R. *Wilford's case*.

10. By the custom of London, the debtor may be arrested before the money is due, to make him find sureties. Vent. 29. Pasch. 21 Car. 2. B. R. in a nota there.

11. A woman declared, by bill original, in nature of debt pro *rationabili parte bonorum*, in the court of the mayor and aldermen of London, and alleges the custom, that when citizens and freemen of London die, their goods and chattles, above debts and necessary funeral

Litt. Rep.
324. S. C.
in totidem
verbis, sav-
ing that
Litt. is in

Trench, and
Hutl. in
English.

funeral expenses, ought to be divided into three parts, and that the wife of the testator ought to have one part, the executors another, to discharge legacies, and dispose at their discretion, and the children of the testator, male or female, which are not sufficiently provided for in the life of the father, to have (notwithstanding the legacies in the will) the other third part, and that the suit for the same ought to be in that court, &c. But the Court agreed, that it may be remanded here, and that being removed in B. R. it may be proceeded upon here, and that it is an original writ by the common law; and said, there were several precedents to this purpose. And Richardson Ch. J. said, that the plaintiff might have declared, without alleging the custom, because it was well known there; but otherwise, where an action upon the custom is brought in a place where the custom extends not. *Holt. 158. Hill. 5 Car. C. B. Calon's case.*

9 Keb. 583.
pl. 122.
Moreton v.
Packman &
Ux. S. C. and
a proce-
dendo was
awarded.

12. A cause was removed out of London by habeas corpus, wherein the plaintiff had declared against the defendant as a *feme sole merchant*; and Bartue moved for a procedendo, because (he said) they could not declare against her here as a *feme sole*, for that she had a husband. Jones contra. The husband may then be joined with her, for he is not beyond sea. Twissden said, I think a procedendo must be granted for the cause alleged. It was resolved in the case of *Langlin and Brewin*, in Cro. (though not reported by him) that if the wife use the same trade that her husband, she is not within the custom. And they are to determine there, whether this case be within their custom; perhaps a victualler (as this trade is) is not such a trade as their custom will warrant; and whether it will warrant it or not, is in their judgment. A procedendo was granted. *Mod. 26. pl. 70. Mich. 23 Car. 2. B. R. Anon.*

a Sound.
250. Green
v. Cole. S. C.
Mod. 94.
pl. 4. Cole
v. Forth. S. C.

13. *Waste* was brought in the hustings upon a lease for years of a brewhouse. *Lev. 309. Hill. 22 and 23 Car. 2. B. R. Cole v. Green.*

3 Keb. 8. S. C.

[197]

13. Holt moved for a procedendo in an action against a *feme sole merchant in London*, removed hither, and alleged, that by the custom of London, it should be tried there; and it was granted per Cur. Comb. 42. *Hill. 2 and 3 Jac. 2. B. R. Soan v. Mace.*

(B) The Custom touching Orphans.

Hutl. 30.
S. C. & S. P.
per Cur.
second-
ing, and
being com-
mitted for
refusal be

1. A WOMAN before she contracts marriage with J. S. agrees with him, that she shall have power to demise the sum of 200l. to any person, and after the marriage, she, by her will, gives it to the children of the first husband, and dies. The husband after acknowledges a judgment at the common law for the security of it, yet, by the custom of orphans of London, he may be compelled by the Court

Court of Orphans of London, to give new security for it at the chamber of London. Pasch. 17 Jac. B. Andrews's case, per Curiam.] brought a habeas corpus, but the was remanded; for the Court held it a taxable custom.

[2. If a man for orphanage-money gives a security in the Privative Court, yet he may be compelled to give other security to the Chamber of London. P. 17 Jac. B. said by Hutton to be the case of one Lush, of late time, resolved.] Hob. 247. pl. 315. Mich. 16 Jac. Luch's case, S. C. and though

the deceased in this case was a free woman fishmonger, yet because the administrator, who had exhibited an inventory of 1000l. debt unrepaid, was required to give bond to the chamberlain, which he refused, and though it was alleged for the administrator, who was committed, that he was already bound in the Privative Court to make account, and so he should be twice bound; and likewise alleged, that he was informed that there were no such custom for widows of freemen, the Court answered, that they could not examine the truth of the custom, but the validity of it, and they held it reasonable enough if it were true; and if the Ecclesiastical Court would impugn a lawful custom, the Court might grant a prohibition. Metl. 138. Lache's case, S. C. in much the same words. S. P. objected, that the custom alleged is not pursued, for it ought to be a free-man, and not a free woman, and likewise, that she dwelt out of London; but Coke and Doderidge held it good enough; for homo includes both sexes, and if she was dwelling at Bristol it is not material; for she may be frank notwithstanding this; and a prohibition was granted. Ant. Rep. 306. pl. 27. Hil. 13 Jac. B. R. Spencer's case.

[3. In London there hath been a Court of Orphans time out of mind, and there hath been a custom, That if any free-man, or free-woman, dies, leaving orphans under age unmarried, that they have had the custody of their body and goods, and that the executors and administrators have used to exhibit true inventories before them; and if there appeared to be any debt, to be bound to the chamberlain, to the use of the orphans, in a reasonable sum, to make a good account thereof upon oath, after they have received them, and if they refused, to commit them till they were bound. This is a good and reasonable custom; and if the Ecclesiastical Court will compel them to make an account there against this custom, a prohibition lies. Hobart's Reports, case 313. Zuche's case.] Hob. 347. pl. 315. Luch's case, S. C. Metl. 138. Lache's case, S. C. See the note to pl. 8. supra.

4. Adjudged that if an orphan, who by the custom of London is under the government of the lord mayor and aldermen, sues in the Spiritual Court for any goods, money, &c. due to him, either by the custom of London or by any legacy, &c. or to have an account, that a prohibition shall be granted, because the government of orphans of London doth by custom belong to the lord mayor and aldermen, and they have jurisdiction of them. 5 Rep. 73. b. Pasch. 35 Eliz. B. R. Orphans of London's case. But though an orphan has the privilege to sue there, yet if he conceives it more secure and better for him to sue in the Court of Requests, [as in the principal case he did] then he may waive his privilege of suing in the Court of Orphans, and sue in the Court of Requests; for quilibet potest renunciare juri pro se introducto, &c. per tot. Cur. and Heath J. said, that he always conceived the law against the case of orphans in 5 Rep. 73. b.

*[198]

5. Debt her in B. R. on a recognizance acknowledged to the chamberlain, according to the custom of London, for orphanage money. Cro. E. 682. pl. 13. Trin. 41 Eliz. B. R. Wilford's case. It was said per Coke, Ant. Gen. to have been so adjudged in the case

of Sharington v. Fulwood. — 4 Rep. 64. b. S. C.

6. In

Raym. 116.
S. C. ad-
judged per
tot. Cur. for
the defend-
ant.

6. In trespass and false imprisonment, the defendant justified by the custom of London, that the mayor and aldermen had the custody of orphans (viz. of the males till twenty one, and of the females till twenty one or marriage;) and that the plaintiff took a city orphan out of the guardianship of A. and at the next court was committed prisoner to the defendant; on demurrer by the plaintiff, exception was taken, that the plea was not good, to take a person without notice of his crime and to carry him to the court to be immediately committed; that he ought to have notice of what he was brought to the court for, so that he might prepare to answer. But the Court held it good; and gave judgment for the defendant. Lev. 162, 163. Pasch. 17 Car. 2. B. R. Wilkinfon v. Boulton.

Raym. 117.
S. C. & S. P.

7. As to the taking and marrying orphans of London without licence a peer has no privilege for such offence. Lev. 163. Pasch. 17 Car. 2. B. R. in case of Wilkinfon v. Boulton.

aVent. 340.
S. C. and
Ld. Keeper
Bridgman,
assisted by
Twisden

8. The portion of an orphan in the Chamber of London is of such a nature, that if the husband dies without altering the property, his widow and not the executors shall have it. Chan. Cases 182. Trin. 22 Car. 2. Pheasant v. Pheasant.

and Wylde, held clearly that this was a chose en action, and not devisable.—S. C. cited Vern. 89.

Mod. 77.
pl. 36. and
79, pl. 43.
S. C. and
H's not
knowing
that she was
an orphan
is not ma-
terial.—

9. H. was committed to Newgate by the Court of Orphans, for that he married an orphan without license first obtained, and was fined 40l. and refused to pay it; H. brought a habeas corpus, to which several exceptions were taken, and among the rest, one was, that it was not returned, that H. was a freeman, but that and all the others were over-ruled, and he was remanded. Vent. 178. Hill. 23 & 24 Car. 2. B. R. Harwood's case.

a Lev. 32.

The King v. Harwood, S. C. resolved.—S. C. cited 3 Wms's Rep. 118. in a note by the reporter.

It was said
contra. Ch.
Prec. 537.
Mich. 1780.
Anon.

10. If a man marries an orphan, who dies under twenty-one, her orphanage part shall not survive to the other children, but shall go to the husband. Vern. 88. Mich. 1682. Fowke v. Lewen.

11. One P. was committed by the mayor and aldermen of London for marrying an orphan without their consent; and was brought into B. R. by habeas corpus; P. was also fined 900l. and this conviction of his fine was removed by certiorari. Exception was taken to this conviction, because the custom, as set out, was, that they had power to commit the party offending where he took away an orphan, and such orphan so taken away did marry; but here the fine is set for marrying without their consent, and it says nothing as to the taking away. But per Holt Ch. J. every marrying is a taking away out of their custody. Hill. 4 Ann. Reg. B. R. The Queen v. Pullen.

[199]
Ch. Prec.
207. Mich.

12. A child, entitled to an orphanage part, dying before twenty-one, and unmarried, * cannot devise it by her will; for by the cus-
tom

from it & survives to the other children; but she may devise what share comes to her out of her father's personal estate by the Statute of distributions, 2 Vern. 558. Trin. 1706. Wilcocks v. Wilcox. 1708. Jefferson v. Ellison. Ibid. 537. Anon. and cites it de-

creed per Harcourt C. and Cowper C. successively, in the cases of Ambrose v. Ambrose and of Rawlinson v. Rawlinson.

† The orphanage part shall survive even after a division, and partition made between the children, but what was devised to them out of the father's part the mother will come in for a share of, according to the Statute of distributions; per Ld. Harcourt. Ch. Prec. 878. Trin. 1718. Leoffel v. Lewes.

13. An orphan cannot release her customary share it being a meer future right, nor can the husband do it, per Ld. Macclesfield; but whether such release will not amount to a composition, or agreement in bar of her future right, or be as they call it, a compounding for her customary share, was not determined. Ch. Prec. 544, 546. Mich. 1720. Kemp v. Kelsey. Decreed that it is a bar; per Ld. Macclesfield. Trin. 1728. Ch. Prec. 594. S. C.

—S. P. but not determined. Wms's Rep. 634. to 647. Pasch. 1720. Blunden v. Barkley.

14. The husband of the daughter of Freeman (who had another daughter and a son) upon receiving a suitable portion released all right and interest, which he had, or might have by the custom or otherwise, except what the father should give by will or otherwise, and by the same deed covenanted that at any time after the death of the father-in-law he would do any farther act for releasing of any right, which he might have by the custom, to the executors, &c. of the said father. The Court seemed inclined that the release being for a valuable consideration, purporting an agreement to quit the right, to be binding in equity; but however the covenant for a valuable consideration, to release the future right, is good, and the executor having, before the bill brought, tendered a release, which the husband refused to execute, the Court decreed an execution. 2 Wms's Rep. 272. Pasch. 1725. Cox v. Belitha.

15. And where the same Freeman had left to his other daughter (a very weak woman) 3500l. by his will, and she being forty years old, and not likely to marry, and the father, after making the will (as was positively sworn by the son the defendant) desired the son to secure to his said sister an annuity of 250l. a year, in satisfaction of her legacy, which he accordingly did; and she, in a publick manner, with the consent of her relations, and friends, and the brother-in-law and sister, as also the trustee in the father's will, were witnesses to the deed, released all her right to her father's personal estate by the custom of London to her brother; and the brother-in-law and his wife, after the death of the said sister, bringing a bill for her orphanage part, the same was dismissed with costs, and decreed the brother-in-law in the cross cause to release his right to the customary part in pursuance of the covenant, and to pay costs there also. Per Jekyl and Gilbert commissioners. 2 Wms's Rep. 272, 274. Pasch. 1725. Cox v. Belitha.

16. The custom of London is, where there are several children, the father may appoint a right of survivorship amongst them. If there be a male child only, the father may devise over his orphanage part, if such male child die before the age of twenty-one years,

Customs of London.

and if there be a female child only, then the father may also devise over in case such female child die before the age of twenty-one, or her marriage. MS. Rep. Pasch. 13 Geo. in Canc. Piddington v. Mayne.

* 17. *Bill against the city of London* by plaintiff, in behalf of himself and the rest of the proprietors of orphan stock, to have an account of the produce of that fund, and to have the surplus of that fund for some years last past to be applied to make good the deficiencies of former years, for that by stat. of 5 & 6 W. & M. cap. 10. *sect. 19.* the produce of that fund is applied for the payment of the annual sum of 4l. per cent. to the proprietors, or so much thereof only, as the money, by this act appointed to be raised and paid as aforesaid, shall yearly amount unto, to satisfy and pay towards the said interest to the said orphans equally in proportion, &c. and that there is no provision by the said act, for making good the deficiency of any former year by the surplus of any subsequent year, &c. King C. assisted with Raymond Ch. J. and Jekyl Master of the Rolls held that the general intent and scope of this act was, to secure 4l. per cent. to the city orphans for ever, for the respective sums due to them from the city, and the several funds thereby raised are appropriated for that purpose, and the city is made trustee for them, and are to have no benefit by those funds, until the 4l. per cent. be paid to the orphans; and though *sect. 13* of the act says, *that the fund shall be yearly applied only to the payment of the annual interest of 4l. per cent. yet the word (only) in that place shall not controul and overthrow the general tenor and scope of the whole act, and that clause seems chiefly calculated for the benefit of the orphans to prevent any misapplications, or to apply any part of the annual fund to make good former deficiencies before the 4l. per cent. for the current year be fully paid and satisfied, and not give the benefit and advantage of any yearly surplus to the city, till all former deficiencies be made good to the orphans.*

Decree, That the city shall account for the several years surplusses received by them, and pay over such surplusses to the orphans pro rata, until the former deficiencies be made good to them, &c. Per Cur. MS. Rep. Hill. 2 Geo. 2 Canc. Ladds v. London City.

12. Where the husband was attainted of felony, and pardoned on condition of transportation; and afterwards the wife became intitled to some personal estate, as orphan to a freeman of London; this personal estate was decreed to belong to the wife, as to a *feme sole*. 3 Wms's Rep. 32. Trin. 1729. Newlome v. Bowyer.

[B. 2] As to the Widow's Part.

1. **W**HERE all the children were advanced, the widow had a moiety. 2 Vern. 666. in pl. 592. Mich. 1710. cites it as the case of *Clare v. Acmooty*.

S. C. cited
10 Mod.
455. Mich.
6 Geo. 1. in
Canc. as

held accordingly, and that in that case it was held, that there the father was to be considered as dying without children, and the estate was to be divided into moieties, the one moiety to go to the



the wife, the other moiety to be the testamentary share of the father, and not at all considered what the nature of the estate was, whether real or personal, out of which the children were advanced:

2. The widow is intitled to the *furniture of her chamber, or in case the estate exceeds 2000l. then to 50l. instead thereof.* In a case before Lord Parker, 18 Mar. 1718. *Biddle v. Biddle.*

* 3. If the wife be intitled to her *customary part*, and the husband dies [and then *she dies*] the executor of the husband shall not have this, but the [executor of the] wife, because it is a thing in action. Held by Lord Chancellor. 2 Freem. Rep. 28. in pl. 30. Hill. 1677. *Ireton's case.*

(B. 3) Custom as to the Wife's Part. Bar thereof by Settlement, &c.

1. **T**HE father, a freeman of London, possessed of a term, assigned it to his son for a provision, and died; the widow sued in Chancery for her customary part; and upon issue tried before Hale, whether by this assignment, he shall be barred of her customary part; it was proved, and found by the jury, that she is not bound by it, as being voluntary, but that *she shall be intitled to her customary part of it, and so the like as of goods.* 2 Lev. 130. Hill. 26 and 27 Car. 2. B. R. *City v. City.*

2. If a woman, before marriage, agrees to a jointure in bar of her customary part, this agreement shall bind her, and she shall never after sue for her customary part. Held by Lord Chancellor. 2 Freem. Rep. 67. pl. 78. Trin. 1681, in case of *Bravell v. Pocock.*

3. A freeman of London leaves the city, and lives in the country 20 years together, and marries, and makes his wife a jointure, and dies, she shall have her share by the custom; per North K. Vern. 180. pl. 174. Trin. 1683. *Rutter v. Rutter.*

4. Marriage agreement provided, that if the wife claim any of the personal estate by the custom of the province of York, then the estate settled in jointure should be to other uses. Decreed, she is bound by the said settlement, and ought not to claim any part of the personal estate; decreed by Lord C. Nottingham. But Lord K. North decreed one third of the personal estate to belong to her as administratrix, and that it was an accruing right, not barred by the marriage agreement. But Lord C. Jefferies set aside the order of Lord K. North, and confirmed that of Lord C. Nottingham, and decreed accordingly. 2 Chan. Rep. 252. 34 Car. 2. *Benson v. Bellasis.*

5. A freeman of London left London, and lived many years in the country, and by his will devised a leasehold to B. and all his books to C. and as to all the rest of his estate, consisting of money, goods, mortgages, and credits, he gave the use thereof to his wife for life, and made B. and C. and others, executors; and directed his executors, out of his estate, to pay the wife's funeral charges

after her death, and gave her the use of his plate for her life, and directed, that his stock and estate, then in D's hands, should there remain during her life, and the product be paid to her for her maintenance, and gave several particular legacies, and devised over the surplus of his estate after his wife's death. It was decreed at the Rolls, and affirmed by the lords commissioners, that the wife should have a moiety of the books and goods, *though specifically devised to others*; and there *being no child*, the widow by the custom was intitled to a moiety, so that the *testator could devise no more than a moiety*, and therefore nothing more passed by the will, and that the specifick legatees should not have any satisfaction out of the surplus for the moiety evicted by the widow by reason of the custom. 2 Vern. 110. Mich. 1689. Webb v. Webb.

[262] 6. A voluntary judgment given by a freeman of London, payable three months after his death, is to be postponed to debts by simple contract, and to the widow's customary part, but will bind the freeman's legatory part. 2 Vern. 202. Hill. 1690. Fairbeard v. Bowers.

Chan. Prec.
17. pl. 17.
S. C. but
Ld. Com-
missioner
Rawlinton

said, he thought that the judgment should be paid before other legacies if there had been any.

7. Any jointure binds and bars the wife; per Dee, city serjeant, and said, that is called a composition. 2 Vern. 666. in pl. 592. Mich. 1710.

In such case
the husband
died worth
18000l. and
had two
sons, and
two daugh-
ters, and
devised two
thirds of his
whole estate
to his daugh-
ters, and one
third to his
sons. Per
Finch C. the
daughters
shall have
6000l. a piece,
and the sons
6000l. between
them. Vern.
R. 6. pl. 4.
Pasch. 1681.
Love v.

8. Where a freeman of London's wife is compounded with before marriage, by settling a jointure, though of land, the wife is taken as advanced, and the children, by the custom of London, shall have a moiety, as if the wife was dead, and so certified in the case of Hall and Ux. v. Lumley. 17 Car. 1. 2 Vern. 665. pl. 592. Mich. 1710. Hancock v. Hancock.

Gilb. Equ.
Rep. 28.
S. C. in tot-
idem verbis.
Abr. Equ.
Cases, 157.
pl. 4. cites
it as decreed
Mich. 1714.
Pott v. Lee.
S. C. in to-
tidem ver-
bis. —
S. C. cited
by Mr. Ver-
non, Arg. as
the case of
Lee v. Pitt,
decreed by
Ld. Cowper
Gilb. Equ.
Rep. 81.

9. The wife of a freeman of London shall not take by her husband's will, and likewise by the custom, unless it be so declared in the will. Chan. Prec. 351. Mich. 1712. Kitson v. Kitson.

10. A widower and widow being about to inter-marry, and having only personal estate, by articles made before marriage, agreed, that in case the husband survived, he should have 2000l. only out of his wife's personal estate, and the rest to be at her disposal, &c. and in case the wife survived, then she was to have 2000l. out of the husband's personal estate, without saying only, or no more; the husband, being a freeman of London, died, and his wife brought her bill for an account of his personal estate, over and above the 2000l. and to be let into her customary share thereof; but it was decreed, that the equal construction of those articles must be to exclude the wife from any farther share out of the estate; and though the words were not so full to exclude her, yet the intent of the articles appearing to be a mutual reciprocal agreement between them for settling each other's claim, ought not

to be extended larger on one side than the other; and decreed, that the wife must have only the 2000l. *Gilb. Equ. Rep.* 95, 96. *Trin.* 1 *Geo.* cited in the case of *Pitt v. Lee*.

11. Bill by a widow of a freeman of London, for her customary share of her late husband's estate.

The case was. The husband made his will, and devised to his wife several shares in the New River water, with remainder over, &c. and gave her several legacies; the will was sealed up in a sheet of paper, and inclosed in the same paper, was a bond found, executed by the testator some time before the date of the will, which bond was conditioned to pay the defendant, being his nephew, the sum of 1000l. or to transfer to him 1000l. stock in the Million Bank, but this bond appeared to be voluntary, and not given upon a valuable consideration, &c.

1st. Quære; if this voluntary bond shall be taken as a debt due from the testator, and consequently to be paid out of the testator's personal estate, before the widow's customary share.

2dly, If the widow must renounce and disclaim all benefit and advantage by the will, as well the devise of the shares in the New River for her life, being real estate, as the devise of personal chattles to her.

Trevor, Master of the Rolls said, the plaintiff must disclaim all benefit and advantage by the will, if she will have a decree for her customary share, contrary to the will, and this is the constant course of this court. [203]

2dly, This bond being in nature of a voluntary gift, is fraudulent against the wife's customary share, and shall not stand in her way, and such sort of contrivances to evade the custom, are always set aside in this court. Decreed accordingly. *MS. Rep. Trin.* 2 *Geo. Canc.* *Edmundson v. Cox.*

12. A. a freeman of London purchased land in the name of B. and C. but no trust was declared. The consideration money (being 9400l.) was mentioned to be paid by B. but was proved to be A's money. But B. (who was an attorney at law) kept the writings, and received the rents of so much, as was let, of the estate, and A. by a paper, all his own hand-writing, purporting an estimate of his estate, and what he was worth, had charged B. as debtor for money lent to him to buy the said estate, and also for interest thereof. A. died; B. afterwards executed a declaration of trust. Decreed, that this declaration after A's death, is sufficient to bar the widow's customary part. But the Court, upon the circumstances, recommended it to the heirs or devisees of A. to let the wife come in for dower of this trust estate. *Wms's Rep.* 321. *Trin.* 1716. *Ambrose v. Ambrose.*

This decree was affirmed in the House of Lords in June 1717. *Ibid.* 323.

13. A freeman bequeathed a legacy to his wife, which, with the other legacies, did not exceed the husband's testamentary part, she shall take both the legacy and her customary part; per Lord C. Parker. *Wms's Rep.* 533. *Hill.* 1718. *Babington v. Greenwood.*

Wms's Rep. 533. at the bottom of the page, has a quære added by the pub.

Wher, whether such legacy must not be given out of the testamentary part, as (he says) appears from the reporter's notes to have been determined about this time, in the case of *Buddle v. Buddie*?

Customs of London.

14. *Money of the husband's and wife's, by marriage articles, lodged in trustees hands, to be laid out in lands, and settled, and to be in bar of dower and jointure is no bar of the customary part; per Lord Macclesfield. For the money in this case, as soon as the articles are executed, is to be looked upon as land too. Ch. Prec. 505, 508. Mich. 1718. Babington v. Greenwood.*

Gilb. Equ. Rep. 94. S.C. argued, and Ld. Chancellor thought the case very strong that she was intitled, but desired to have the custom certified.——Equ. Abr. 157. &c. pl. 5. S. C. says, that the certificate was, that had it been made in bar of her share of the personal estate it had been a bar, but if expressed only in bar of dower, or thirds of lands, the same had never been in controversy in this court, nor had they any custom concerning it. It was afterwards decreed, Pasch. 2 Geo. 1. to be no bar of the customary share.——Chan. Prec. 508. S. C. cited as clearly decreed to be no bar.

Both the same points held accordingly by Ld. C. Parker, and said, that land, or a real estate, is of a quite different nature from personal estate, and a matter wholly out of the custom. *Wms's Rep. 531, 532. Hill. 1718. in case of Babington v. Greenwood.*

Select Cases in Canc. in Ld. King's time, 14. May 4. 1725. S.C. but not decreed,——3 Wms's Rep. 15. pl. 5. S. C. Ld. Chancellor declared, that the wife in this case was barred of her customary part.

16. Acceptance of a settlement before marriage *out of the personal estate, without any notice taken of the custom*, bars the widow's customary part of the personal estate, if she survives, as by virtue of the custom, but does not debar her of taking any gift or devise the husband thinks fit to make her. Abr. Equ. Case 159. Trin. 1727. *Lewen v. Lewen.*

[204] (B. 4) Orphans protected, favoured, and relieved,

1. 4 & 5 P. & M. **D**OES not take away any custom touching cap. 8. S. 7, any orphan within the city of London.

2. The defendant was bound by recognizance to the chamberlain of London for payment of divers sums of money for orphans portions; and departed out of this city, and dwelt in Oxfordshire, leaving no estate behind him in the city; so as the process of the city cannot take hold; therefore a subpoena is granted against him upon pain of 100l. to appear before the mayor and aldermen, and to stand to their order. Cary's Rep. 60, cites 2 Eliz. fol. 5. Mayor, &c. of London v. Dormer.—Afterwards fol. 67. Ordered, if he do not appear, an attachment is granted.

3. An orphan under age whose father left him 1000l. which was in the Chamber of London, married a wife with a good portion, she was allowed 240l. out of the 1000l. and so relieved against the custom of London. Chan. R. 26. 4 Car. 1. *Havers v. Burton,*

4. Defendant,

4. Defendant, for what money he has put out belonging to the plaintiff, as her orphanage money, shall account and pay *interest* after such rate as is allowed for orphanage money by the Court of Orphans, and no more. Chan. R. 108. 12 Car. 1. Hayne v. Nelson.

5. Upon the *marriage* of orphans, the custom is to appoint the *common serjeant* to treat and take security for the orphan. Arg. 2 Vent. 341. Mich. 22 Car. 2. in case of Pheasant v. Pheasant.

6. On a *bill to bring in a foreigner to give security* to the city for the orphan's portion according to the custom of the city, Bridgman K. decreed the plaintiffs to try the custom. Chan. Cases, 203. 23 Car. 2. Mayor, &c. of London, and Byfield v. Slaughter, & al. the executors of the plaintiffs father.

7. Orphanage part, according to the custom of the city of London, was decreed *with costs*. Fin. R. 248. Hill. 28 Car. 2. Hill v. Blacket and Rodes.

8. Plea of an account of an orphan's estate, before the aldermen of London, was disallowed, and a surcharge allowed to be made thereon by Lord Chancellor. 2 Chan. Cases, 170. Hill. 1 Jac. 2. Newdigate v. Johnson.

9. The plea for an account before the aldermen was disallowed, and a surcharge allowed by the Ld. Chan. to be made, and decreed the executor to pay interest at 6l. per cent' for the money not paid into the Chamber, till he paid it in, though the Chamber usually took but 5l. per cent.' 2 Ch. Cases, 170. Hill. 1 Jac. 2. Newdigate v. Johnson.

10. This custom of the city of London is the remains of the old common law, that a man could not give away any part of his estate without the consent of his children, and is so taken notice of in Bracton, but being found extremely inconvenient and hard, it was by the tacit consent of the whole nation, abrogated and grown into disuse, (for what law has ever been made to repeal it?) and kept up only in the city of London; per Ld. Macclesfield. Ch. Prec. 596. Tr. 1722, in case of Kemp v. Kelsey.

11. By the custom of London, a freeman cannot devise either the orphanage part, or the contingency of the benefit of survivorship among orphans. Neither can an orphan devise his orphanage part, or the part which accrued by survivorship. But such freeman may give by will to his children, legacies inconsistent with the distribution under the custom; and then such children must make their election, whether they will abide by the will, or by the custom? But they cannot abide by the will in part only, and take the benefit of the custom also. Cases in Equ. in Ld. Talbot's time, 130. Hervey v. Desbouverie. [205]



(B. 5) Orphans. What Persons are intitled to the Benefit of the Custom, or excluded from it.

1. **T**HERE is no such custom, as that a child *marrying under eighteen years, without the father's consent*, shall lose her orphanage part. Fin. R. 248. Hill. 28 Car. 2. Hill v. Blanket and Rhodes.

2. A freeman of the city of London dies leaving a wife and child, the wife dies, her third shall go to the executor, or administrator; so if the child dies, and leave an executor, the child's part shall go to the executor, but not to the administrator of such child; for if there be no executor, it shall go to make up and increase the orphanage money of the other children. Arg. 2 Show. 409. Mich. 36 Car. 2. B. R. in case of Palmer v. Allicock.

3. A daughter of a freeman, *marrying without her father's consent*, loses her orphanage's part, unless he is reconciled to her before his death. Vern. 354. Hill. 1685. Foden v. Howlet.

4. The custom of London doth *not extend to grand-children*; as if A. the grand-father dies, leaving the father with several daughters, these daughters are not within the custom. Per Ld. Keeper Cowper. Hill. Vac. 5. Ann.

5. A *grand-child* is not within the custom of London to come in for his father's or mother's share, together with the other children of a freeman; and this has been settled by the Ld. Chancellor, where a deed, by way of provision for a grand-child, being made by the grandfather, after the father's death, in order to introduce him into his father's place, was set aside, as made in fraud of the custom, against the surviving children. Chan. Prec. 470. pl. 295, Pasch. 1717. Northey v. Burbage.

Gillb. Equ. Rep. 137. S. C. in totidem verbis. Wms's Rep. 340. pl. 90. Northey v. Strange, S. P. and seems to be S. C. admitted by counsel, and said to have been so determined and settled.

(B. 6) Bar. What is a Bar of the Children's Part, or otherwise, and what shall be said an Advancement.

1. **R**ESOLVED that where a citizen of London *devises a legacy to one of his children*, that notwithstanding that child shall have his share out of the customary part, unless it doth appear, that by the intent of the testator, that legacy was to go in satisfaction of his whole share. 2 Freem. Rep. 28. pl. 30. Hill. 1627. Ireton's case.

[206] 2. A man devised 3000l. to his daughter, and the residue of his personal estate he devised to his brother. The question was; Whether this daughter should have her customary part besides this legacy, by reason that he gave the residue to his brother, which is a kind of an implication, that the daughter should have the 3000l. and no more; and if she should have her customary part too, there would

would be nothing left for the brother. But the Ld. Chancellor held clearly, that *she should have her legacy and her customary share too*; there being no words in the will to exclude her, the *shall not be barred by implication*; and if there were nothing for the brother, he could not help that, it must go as far as it would. 2 Freem. Rep. 67. pl. 78. Trin. 1681. Bravell v. Pocock.

3. Per Cur. *any provision made by the father in his life-time for his children, is an advancement within the custom unless it be declared by writing, that they are not sufficiently advanced, and for some time it was held that in such writing there must be * mention made what summe they received from their father because of bringing it into hotch-pot.* Vern, 89. pl. 78. Mich. 1682, Fouke v. Lewen,

or in pursuance of a marriage agreement. Ibid. 89, 90.

4. The father by a *prior will declares a child not fully advanced*, and after revokes that will, and by a *latter* declares that child *fully advanced*, such former will is a sufficient declaration to let the child into hotch-pot. 2 Chan. Cases 117. Trin. 34 Car. 2. Anaud v. Honeywood.

&c. certified and held accordingly. — S. C. & S. P. certified, Mich. 34 Car. 2. Ibid. 129. — Vern. 345. pl. 340. S. C. but S. P. does not appear.

5. A *portion of money given by a freeman of London to his son, has ever been taken for, and towards the advancement of such son out of his father's personal estate, within the custom of the city of London,* 2 Chan. Cases 118. Trin. 34 Car. 2. Anaud v. Honeywood.

6. Father on his son's marriage, pursuant to articles for *pur-*
chasing lands to be settled on his son and his wife, &c. advances
4000l. Quære, If this be advancement to bar him? The Chan-
cellor decreed, the son to have a share of his father's personal
estate, without bringing the 4000l. into hotch-pot. 2 Chan. Cases
119. Trin. 34 Car. 2. Anaud v. Honeywood.

any part of the personal estate. — 2 Chan. Rep. 179 to 187. S. C. and the Court declared, that this money shall be taken as land, and not as personal estate.

7. Where a citizen has several children, some advanced, some
not. *The advanced die.* The father dies. There shall be no
consideration had of the dead children, who were advanced; but it
is all one as if they had never been. Decreed. 2 Chan. Cases.
119. Trin. 34 Car. 2. Beckford v. Beckford.

Rep. 527. Trin. 1729. Cleaver v. Spurling.

8. A freeman of London having several *chymical receipts* of a
very great value, as he imagined, gave them a little before his
death to J. S. who had married one of his daughters. It was
alleged in order to bring the same into hotch-pot, that they
brought J. S. the defendant 500l. a year, and plaintiff offered to
give the defendant 500l. for his interest therein, and so insisted
that they ought to be looked upon as part of the freeman's per-
sonal

sonal estate, and that defendant account for them to the plaintiff, who had married the other daughter. * But Ld. Chancellor would not decree the same, saying he would not countenance such a piece of quackery as to put a value upon them. Vern. 61, 62. pl. 59. Mich. 34 Car. 2. Jenks v. Holford.

Vern. R.
216. Civil
v. Rich.
S. C.

9. If a citizen conveys to a child land of inheritance, though it be expressed for advancement, it bars no child's part; but such child may come in for a share, &c. with the rest. This was certified by the recorder. 2 Chan. Cases 160. Hill. 35 & 36 Car. 2. Rich v. Rich.

Vern. 345.
pl. 339.
S. C. Ld.
Chancellor
said, It is
beyond all
doubt that
it must be
brought in
to the or-
phanage
part only.

10. The question was, whether the children, who are declared not fully advanced, are to bring what they had received into hotch-pot with the orphanage thirds after the estate is divided into thirds, and not into hotch-pot with the whole estate; and decreed accordingly, not to be with the whole estate; and what hath been received by any one more than their share, and legacies, is to be repaid, as the master shall appoint. 2 Chan. Rep. 359, 360. Jac. 2. Beckford v. Beckford.

—a Vern. 281, 282. pl. 259. Mich. 1698. S. C. and S. P. accordingly.

11. A freeman gave a portion with his only child on her marriage. Whether she was excluded thereby of her orphanage part, the testator not having declared by will, or otherwise, that she was not fully advanced? 2 Vern. 234. pl. 215. Trin. 1691. Fane v. Bence.

12. With regard to the advancement of a child, it has been determined, that small inconsiderable sums occasionally given to a child, cannot be deemed an advancement, or part thereof. Thus maintenance money, or an allowance made by a freeman to his son at the University, or in travelling, &c. is not to be taken as any part of his advancement, this being only his education, and it would create charge and uncertainty to inquire minutely into such matters. So putting out a child apprentice, is no part of his advancement, for it is only procuring the master to keep him for seven years, instead of the parent. Trin. 1718. at the Rolls. Hender v. Rose. But the father's buying an office for his son tho' but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements pro tanto. 3 Wms's Rep. 317. in the note, cites Norton v. Norton. Mich. 1692. by the Lords Commissioners Rawlinson and Hutchins.

The very
declaring
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vanced was,
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13. Where it appears, any how, under the father's hand, how much a child has received, though it is therein said, that the said portion is, or was, in full of his child's part by the custom, yet the child shall come in for the customary part of the rest of the father's personal estate, bringing the portion already received into hotch-pot; otherwise it is, if it does not appear under the father's hand what the advancement was. 2 Salk. 426, 427. Anon.

and though the child afterwards received further greater sums from his father, and the certainty thereof appeared by his own answer, yet those sums, which were additional gifts to his advancement, being with the sum mentioned by the father, brought into hotch-pot, will not bar his orphanage part. Wms's Rep. 348. Hill. 1716. decreed by the Master of the Rolls, Northey v. Strange.

Statute.—Chas. Prec. 470. pl. 295. Pasch. 1717. Northey v. Burbage, S. C.—Gilb. Eqn. Rep. 136, 137. S. C. in totidem verbis.

14. By the custom of London, if a freeman hath advanced a child in his life-time, and it appears by his will, or by any writing, what the sum advanced is, and that the sum advanced is less than the customary share doth amount unto, such child, so advanced, may come in for a customary share, bringing the sum so advanced into hotch-pot; but if it doth not appear what the advancement is, then the advancement is a bar of the customary share. The case here was, that the father of the plaintiff and defendant in his will takes notice, that he had advanced the plaintiff in his life-time, by giving her 300l. and upwards, and thereupon gives her 5s. only by his will. And the question was, whether this shall be taken to be such a certain sum appearing in writing that she may put it into hotch-pot, and come in for her customary share, by reason of the word (upwards) which, as it was said, made it very uncertain; but decreed that this was a certain sum appearing in writing, and he would take it to be 300l. only; and although it was said, that by the word (upwards) it might be taken to be 500l. or 1000l. the Master of the Rolls said, it could not be so intended here, but that it might be intended a little more, and so little, that the testator did well know, & de minimis non curat lex. Note, it was supposed that the word (upwards) was inserted purposely to make it uncertain, which made it look like a trick; but if he had taken notice that he had advanced his daughter, and not said of what, she had been barred; but here it was decreed, that she should come in for her share, bringing the 300l. into hotch-pot. 2 Freem. 279, 280. pl. 351. Hill. 1704. Bright v. Smith. [208]

15. If a freeman of London enters in his books several sums of money, as paid on account of his daughter's portion, he cannot afterwards write off again, or make the husband debtor for them. Per Cowper C. 2 Vern. 631. pl. 560. Hill. 1708. Dean & Ux. v. Ld. Delaware. S. C. cited per Ld. C. Parker. Wms's Rep. 642, 643. and that though

the same be written by the free-man's book keeper or servant, it is as sufficient as if written by the freeman himself, and such advancement may be brought into hotch-pot.—But Ibid. 643. in a note added at the bottom of the page, is a quere, If this is warranted by the certificate of the case, which was as follows, [and which I will add here to shew the form of such certificate.] “Dean & Ux’ v. Ld. Delaware, May 9. 1710. In pursuance of an order of 16th December then last, it is certified, that if a freeman of the city dies, leaving a wife and one daughter married in his life-time, and it appears by the books of such freeman, that he had paid several sums of money in part of such daughter's portion unto her husband, and afterwards several other sums, which ought to be taken as paid on account of the portion, but not expressly entered in such freeman's books as paid in part of advancement, or in part of the portion, (all which entries are of the testator's own hand writing) and such sums taken altogether do not amount to a third part of such freeman's estate, put together with what he left at his death, such daughter ought not to be taken as fully advanced, but in part advanced only; and in such case, by the custom of the city, such child and her husband are to have a third of what the testator left at his death, without regard of what was received in the father's life-time, and without putting what had been so received to the estate left at his death.”

16. A freeman of London, who was a widower, and had several children, being possessed of a considerable leasehold estate, on a second marriage conveys these leases in consideration of 2000l. Any land of inheritance settled by the freeman upon

His children, is not to be called an advancement, either in part, or in all, within the custom, in regard they are not within the custom, which affects only the personal estate of the freeman; *otherwife of a lease for years.*

But if lands of inheritance are given to a child in bar of the orphanage part, and accepted as such, it will be binding, or at least the child cannot have both; per Jekyl and Gilbert, commissioners. 9 Wms's Rep. 274. Pasch. 1725. Cox v. Belisha.

tion, in trust for himself for life, remainder to his wife for life, in lieu and bar of all dower, customary estate, &c. remainder to the first son of that marriage, and so to every other son; and in the settlement there was an agreement, that trustees should sell these leases and invest the money in the purchase of lands of inheritance, to be settled to the uses aforesaid; but the husband dying before any purchase made, it was held first, that the wife was barred from claiming any other part of the personal estate. Secondly, that the children by the first venter could have no right to those leases; neither would this settlement prevent the children of the second marriage from coming in for a share of the rest of the personal estate; for by the agreement these leases are now to be considered in equity, as if a purchase had been actually made, and the freeman had paid the money out of his pocket. Equ. Abr. 153. pl. 8. cites 2 Vern. 669. Mich. 1700. [1710] Hancock v. Hancock; [but that is only a short note of the case.]

[209]
Abr. Equ.
Cases, 157.
S. C.—
Gilb. Equ.
Rep. 81.
S. C. in
tandem ver-
bis.

17. A freeman of London married a widow of a considerable fortune, but she had several children, and it was agreed, that he *was to have 600l. only of her fortune*, and the rest to be settled upon her children, and *in case she survived him she was to have 600l.* to be paid her by his executors; accordingly a deed was executed and the *parties were mentioned to be citizens of London.* This was decreed by Ld. Harcourt as a satisfaction of her customary part, and took notice that the deed was expressly worded in consideration of the marriage and marriage portion, so that he was absolute master of that 600l. and therefore this 600l. must be looked upon to come out of his personal estate. But as to the moiety of the other moiety (no issue being of the marriage) there was no question made, but the widow would be intitled to it, and an account was decreed accordingly. And the Master of the Rolls took notice of the deed mentioned to be made between the parties, citizens of London, so that the custom might be well supposed to be in their view. Ch. Prec. 355. pl. 248. Hill. 1711. Whithill v. Phelps.

2 Vern. 605.
Pl. 543. Hill.
1707. is not
S. C. not
S. P.—
Ibid. 666.
pl. 592.
Mich. 1710.
S. C. but
that is only
where it is
the wife of
a freeman.

18. A freeman of London having children by his first wife, and being about to marry again, made a settlement of some leasehold estate on his intended wife, and the issue of that marriage; the marriage takes effect. The husband dies having issue, and a considerable personal estate. The children, by their first venter, brought their bill for an account of the personal estate, and insisted it wholly belonged to them; and that the second wife and her issue ought to be excluded from any share thereof by reason of the provision made for them; it was decreed that *this composition with his wife before marriage bound her, but the children, being infants, were left to make their election when they came of age, whether they would abide by that provision made for them by that settlement, or relinquish that, and come in for their customary shares only; and afterwards*

afterwards on a rehearing, what should become of the customary part; it was held to fall into the husband's share; and in case no disposition was made thereof by him, it must go according to the statute of distributions. G. Equ. Rep. 95. Pasch. 1 Geo. cited in the case of Hancock v. Hancock.

19. Smith was a freeman of London, and had issue one child only, a daughter, and gives her 3000l. portion, and marries her to the plaintiff Maggot, and is a party to the marriage-articles, wherein this sum of 3000l. is declared to be given to her for her portion by her father, the said Smith. Afterwards the said Smith makes his will, and thereby devises the sum of 1000l. to his said daughter, and likewise gives several legacies to her children; he also gives to his daughter certain lands for her life, &c. and then follows this proviso (viz.) provided if my said daughter shall not within two months after my decease, upon request to her made by my executrix, give a good and sufficient release to my executrix of all her right and interest to her customary share of my estate, &c. Then my will is, that the legacy to her of 1000l. and the several legacies aforesaid to her children, shall be void, and makes his wife (now defendant) his sole executrix and residuary legatee.

MS. Rep.
Trin 2 Geo.
Maggot v.
Smith.

The bill was brought by the husband and wife, in right of the wife, for her customary share of the testator's estate.

1st, It was agreed, where the portion of the child appears in certain under the father's hand, such portion shall not be taken for a full advancement in the life-time of the father, to exclude and bar such child of her customary share.

2dly, Where a freeman dies, leaving only one child, who has had a portion from her father in his life-time, such child shall not put her portion in hotch-pot, but is intitled to her customary share, besides what she had for her portion, because where there are more children than one, such portion shall be put in hotch-pot, only with the customary share belonging to the children, that all the children may be equal. See Lord Delawar's case.

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3dly, It was resolved in this case, that the plaintiff's wife need only release her chattle legacy, and not the devise of the lands to her for life, because the express condition in the will doth controul the implied condition by the custom, that she must renounce all benefit by the will, if she will take advantage of the custom in subversion of the will.

4thly, If the children, being infants, shall forfeit their legacies according to the proviso, or not by the act of the mother. This point Lord Chancellor would not now determine upon this bill, but said, it would be time enough to do that, when they should bring a bill for their legacies; but as to the other matters decreed ut supra. Per Cowper C. MS. Rep. Trin. 2 Geo. Maggot v. Smith.

20. A provision for a child on her marriage by a freeman is no bar to any future share she might be intitled to by the custom, any more than it would be to her taking by descent or devise. Cited by Mr. Vernon. Ch. Prec. 508. as decreed by Ld. C. Cowper. Mich. 1717. Platt v. Stanton.

21. S.

2 Vern. 768;
pl. 6; 8 S.C.
but only
some short
notes of it.

21. S. brings a bill for one third of his wife's father's personal estate; a settlement by agreement, &c. was made on the marriage, and the father gave with his daughter an estate, as for her marriage portion, &c. By will, the father gave a 1000*l.* to his wife, and five tenements (which were his on leases) to trustees in trust for the daughter's separate use, and made the wife executrix. S. being beyond sea, left the wife and children upon the mother, who maintained them. Per Cowper C. 1st, An advancement of a daughter by a real estate as her portion, &c. was not an advancement within the custom; but if it were in land, the certainty doth appear, and the land must be valued, and brought into hotch-pot; the custom has no relation to an estate of inheritance; if a freeman lays out his money, the custom is defeated; but if there was any provision made by agreement, &c. that instead of money as a portion, &c. the father should diminish his personal estate by making a purchase, it might be a question how far this would be within the custom? But lands descended, or purchased, are not. 2dly, That S. must have one third of the clear personal estate, deducting the widow's chamber, * paraphernalia, &c. 3dly, That the five tenements given to the separate use of the wife, should not go in part of this one third to which the husband was intitled, for that the daughter had no election in this case. She could not choose the one third, because that was in the power of the husband, and to his account; and as the five tenements are here given to the trustees, it is of a different kind from the husband's one third; nor is it to the same person; so it cannot go in part of satisfaction within the meaning of the testator. In cases of the custom, the legatee has an election, whether he will renounce his legacy, or his one third part. Here the father has under all events, *ex abundanti*, made a provision for the separate use of his daughter out of the part which the father had power to dispose of. 4thly, If the legacies fall short, every one must abate in proportion; but if the daughter's separate provision fall short, which the father intended her, the Court ought to lay hold on that which the husband ought to recover when the account is taken, and it ought to be brought before the Master, especially if the husband's going away were without the wife's default. 5thly, This specific legacy of the five tenements must be valued, and every one must abate in proportion. 6thly, The wife and executors must have her 1000*l.* besides her one third part. Mich. 4 Geo. Stanton v. Plat.

[211] 22. Sir W. W. in 1718. made his will, giving to his daughter 7000*l.* and to his son and executor, all the rest of his estate. He declared that this legacy to the daughter was in satisfaction of all she could claim, &c. under the custom, and she was to declare within one month after his death whether she would abide by that or not, and she was to release, &c. The testator lived two years after this will, and after his death, the daughter marrying within a fortnight, they were both made acquainted with the will, and the executor and son came one morning, and made a delivery of some plate, &c. specifically devised, and also assigned an annuity in the Exchequer, which was given to the daughter, &c. and being asked

to execute a release some time was desired for consideration, &c. In Mich. Vac. the question was, on a plea to the discovery and account prayed by a bill, whether what the daughter and her husband had done, did amount to such an acceptance as did determine their election, and to exclude them from a share by the custom; and per Ld. Chancellor the plea was allowed, because they had not made any election by the bill to wave the will, but with a saving to any farther claim, or right they might make, i. e. by amending their bill, and running the hazard of the account of the personal estate; for whether it be more or less, they must abide by the event of it. He declared that it was the testator's intention, that if she accepted of the legacy, she was to take that in satisfaction of the whole, under the custom, and that he never intended she should have an account of the personal estate, to see whether it was her best way to abide by the one or the other, she was to have no such liberty, and therefore he confined her to a month's time to declare herself, so that all objections made from her, being under any surprise, or having any thing misrepresented unto her, is out of the case. It is likely Sir W. W. thought the custom very hard, and he had a mind to tie her down; but yet this must be a compleat acceptance by her of all that he had imposed, but in this case it doth not appear that all was finished and completed, some things she did accept of, but the executing of the release was put off, and other matters, for farther consideration, so that this was not a full and entire acceptance, though he thought that if all had been done and accepted of without the release, that was not so necessary to be done within the month, but might be executed at any time. Per Ld. Chancellor. Mich. Vac. 1721. *Smith v. Withers*.

23. Where a daughter, who married without the father's consent, was afterwards advanced in part, and the freeman, the father, had settled some leasehold estate to the separate use of the daughter, the feme covert, this ought to be brought into hotch-pot, it being, in the strictest sense, an advancement of the child *pro tanto*; 2 Wms's Rep. 273, 274. Pasch. 1725. per Jekyl and Gilbert commissioners. *Cox v. Belitha*.

24. A settlement was on the wife of a citizen of part of the personal estate of the husband, in bar and satisfaction of all her claim, and demand out of his personal estate by the custom or otherwise. The husband died intestate. The wife is barred of her distributive share of her husband's estate by the statute of distributions by force of the words (*or otherwise*) for they can extend to nothing else; and it was said to be twice so adjudged by Cowper C. in the case of *Pit. v. Lee*, and *Davila v. Davila*; and decreed accordingly by King C. MS. Rep. Mich. 13 Geo. in *Canc. Badcock v. Stanhope*.

25. Though a declaration by a freeman's will only, that a child was fully advanced, is not of itself sufficient, yet where the advancement was forty years before the freeman's death, so that it was difficult to prove an advancement made at that distance of time, yet a proof was read that the daughter's husband had confessed

Customs of London.

*feffed he had received above * 1000l. portion with his wife from the freeman at his marriage, this was satisfactory. 2 Wms's Repi 527, 528. Trin. 1729. at the Rolls. Cleaver v. Spurling.*

Where a daughter of a freeman of London accepts of a legacy of 10,000l. left her by her father, who recommended it to her to release her right to her orphanage part; which she does release accordingly; if the orphanage part be much more than her legacy, though she was told she might elect which she pleased; yet if she did not know she had a right, first, to enquire into the value of the personal estate, and the quantum of her orphanage part, before she made her election; this is so material that it may avoid her release. 3 Wms's Rep. 316. Trin. 1734. Pusey v. Desbovrie.

27. A. a freeman of London had issue two sons, B. C. and four daughters, D. E. F. and G. He in his life-time gave to B. and C. and to D. and E. 1500l. a piece, and took several receipts in the following words, viz. Received of my father A 1500l. which I hereby acknowledge to be on account; and in part of what he has given, or shall give unto me his son [or daughter] in, or by his late will. Afterwards A. made his will thus, viz. *And whereas I have heretofore paid to, given, or advanced with my children B. D. and E. [omitting C.] the sum of 1500l. a piece, now I do hereby in like manner give and bequeath unto my three other children, C. F. and G. the several sums of 1500l. a piece, and then gives the residue equally among his children.* The custom of London being waved on all sides, the question was, whether C. should have another 1500l. upon the later words of the will, or should be in the same case with B. D. and E. they being equally advanced by the father and this seeming to be only a mistake in the testator, it was insisted that the receipt could not controul the express subsequent gift of the father, and that the omitting C. should be plainly intended a difference between them. But Ld. C. Talbot decreed the 1500l. received by C. in A's life-time to be a satisfaction for what A. gave him by his will, and that he should not have another 1500l. upon the later words. Cases in Equ. in Ld. Talbot's Time 71. Pasch. 8 Geo. 2. Upton v. Prince.

(B. 7) As to the Children's Part in Case of Survivorship. To whom it shall go.

S. C. cited
3 Wms's
Rep. 318.
in a note of
the re-
porter.

IF a freeman of London dies, leaving several orphans, and any of them die under age, whether this part is by the custom to go to the survivor? Vernon for the plaintiff argued, that it did by the custom go to the survivor, and had known a case where one married an orphan, and made a settlement on her, and she after died under age; her fortune went to her surviving brothers and sisters, and her husband could not have it; it was admitted by the court and counsel, that *the father's will* in this case (*which gave it the survivors*) did operate nothing, because they did not claim under him; but by the custom paramount the will, though a case was cited

temp.

temp. Eliz. where it was held, that the father may devise the orphanage part of the child, if he die within age, so that it be not to the prejudice of another orphan. Afterwards 5th 1702, the recorder certified the custom to be, that if the orphan son dies before 21, his share survives; and if a female dies unmarried, and within the age of 21, her share survives * likewise, and the orphan cannot give it away by will. Chan. Preci 207. pl. 167. Mich. 1702. Jaffon v. Effington.

2. If there be a widow and two daughters, and one of the daughters dies, her orphanage part shall wholly survive to her sister, and that even after a division and partition made between them; but if the father's legatory part was devised to the daughters, that is under the direction of the statute as a legacy, and must be distributed between the mother and the surviving daughter accordingly; this difference was taken and agreed by the Court. Chan. Prec. 372. Trin. 1713. in case of Loefes v. Lewen.

3. A freeman left at his death a wife and several children, one of the children died seven years old. It was agreed that share should survive, and that it was not subject to the statute of distributions, but quære, whether it survived to the mother, as well as brothers and sisters? The orphanage part is not due till 21, so that an orphan cannot dispose of it sooner. Mich. 7 Geo. Canc. Master of the Rolls. Knipe v. Wale.

4. Devise of lands to trustees in fee, in trust within six years after the testator's death, to raise and pay 1500l. to his daughter A. A. dies within the six years; the 15l. shall go to the administrator; here being no certain time limited when, but only the ultimate time, within which it shall be raised. 3 Wms's Rep. 119. pl. 27. Hill. 1731. Cowper v. Scot, & al'.

(B. 8) Of Bringing into Hotch-pot.

1. AN orphan who was advanced with 200l. being the only child, is not to bring it into hotch-pot. 2 Vern. 629. cites 17. Jac. 1. Wood v. Fettyplace.

2. Sum of money given by a freeman of London to a daughter, if not given as a marriage-portion, or in pursuance of a marriage-agreement, is no advancement, as monies given at christenings and lyings-in; but however must be cast into hotch-pot: Vern. R. 61. Mich. 34 Car. 2. Jenks v. Holford.

3. Heiress has lands given her in frank-marriage; those must be cast into hotch-pot; otherwise of lands conveyed or given to her by her father, or other ancestor after the marriage. Per Counsel. Ibid.

4. Where an heir or co-heir had a real estate settled on him by the father, it is out of the custom of the city of London, and though the father should after declare the same to be a full advancement for such child, yet, it is no bar to his orphanage part, neither is it to be brought into hotch-pot: Vern. R. 216. Hill. 1683. Civil v. Rich.

Chan.
Case, 309;
S. C. but
S. P. does
not appear.
—a Chan.
Rep. 143;
S. C. but
S. P. does
not appear.

But if the sum certain mentioned by the father, is less than her customary part will amount to this will let her into her share by the custom.

5. Where a child is married with the father's consent, and there is a *portion given in marriage*, such child is debarred from claiming any benefit of the orphanage part, unless the father shall by writing under his hand and seal, not only declare that such child was not fully advanced, but likewise *mention in certain, how much* the portion given in marriage did amount unto, that so it may appear what sum is to be brought into hotch-pot. Vern. 216. Hill. 1683. Civil v. Rich.

2 Vern. R. 630. Hill. 1708. cites Turner v. Longland. — For * otherwise it shall be intended a full and complete advancement. 2 Wms's Rep. 527. Trin. 1729, by the Master of the Rolls. Cleaver v. Spauling.

* [214]

2 Vern. 274. S. C. cited.

— Ibid.

281. Mich.

1692. S. C.

& S. P. —

2 Chan. Rep. 359. S. C. — 2 Vern. 754. Mich. 1717. Stanton v. Platt. S. P.

6. Money to be brought into hotch-pot by an orphan, shall be brought into the *orphanage part only*, and not into the personal estate in general, so as the widow to come in for part of it. Vern. 343. Mich. 1685. Beckford v. Beckford.

2 Chan. Cases, 117. S. C.

7. Money given by a freeman of London, to be laid out in land and settled on his eldest son for life, remainder to his first and other sons in tail, shall not be reckoned any part of his advancement, and be brought into the hotch-pot. Vern. R. 345. Mich. 1685. Annand v. Honeywood.

S-e Equ.

Abr. 135.

in the note

to pl. 4. of

the S. C. the

certificate

recited ver-

batim, viz.

We the Ld.

Mayor and

Aldermen

of the city

of London,

having

heard the

said parties

and their

counsel

learned in

the law, do

humbly cer-

tify your

lordship,

that by the

laws and

customs of

the city, if any

freeman's child,

male or female

be married in

the life-time of

his or her father,

by his consent,

and not fully

advanced to

his or her full

part or portion

of his or her

father's per-

sonal or custom-

ary estate, as

he shall be

worth at the

time of his

decease, then

every such

freeman's

child so mar-

8. Upon a reference to the recorder of London, by Ld. Chancellor, to certify what is the custom in London, concerning the advancement of children by their fathers, &c. which would exclude them from having shares of the personal estates of their fathers after their death; Serjeant Lovell, Recorder of London, certified the custom to be thus, viz. If the father gives to the child 1500*l.* and in his will declares, that he has advanced him, and afterwards dies, the child shall have no part of the residue of the personal estate of his father. But if he had said by his will, that he had given 1500*l.* (which was a sufficient advancement) yet, upon putting it in hotch-pot after the death of his father, he shall have his share of the personal estate of his father, &c. And if a man marries his daughter, and gives her a portion, if he does not take any notice of it in his will, this will be a sufficient advancement, and she shall have no share of her father's personal estate after his death. Ex relatione m^{ri} Selby. Note, Mr. Cheshire was also present in Chancery, when Mr. Recorder made this certificate; but he did not entirely agree with Mr. Selby about the certificate Ut supra. Ld. Raym. Rep. 484. Trin. 11 W. 3. Chase v. Box.

the city, if any freeman's child, male or female be married in the life-time of his or her father, by his consent, and not fully advanced to his or her full part or portion of his or her father's personal or customary estate, as he shall be worth at the time of his decease, then every such freeman's child so married as aforesaid, shall be excluded and debarred from having any other part or portion of his or her said father's personal or customary estate, to be had at the time of his decease, except such father by his last will and testament, or some other writing by him written, and signed with his name or mark, shall declare or express the value of such advancement; and then every such child, after the decease of his or her said father, producing such will or other writing, and bringing such portion so had of his or her father, or the value thereof into hotch-pot, shall have as much as will make up the same a full child's part or portion of the customary estate, his or her said father had at the time of his decease; notwithstanding such father shall, by any writing under his hand and seal, declare such child was by him fully advanced.

9. If a freeman has *one child only, which has received some portion* from his father, and the father dies; leaving this child and a wife, the child shall have his full orphan's part, without any regard to what he has already received, for that advancement in part is only to be brought into hotch potch with children, and not with others; per Sir Edward Northey. 2 Salk. 426.

2 Vern. 234.
Trin. 1691.
Fane v.
Bence. S. P.
agreed.
S. P. —
Ibid. 629.
Hill. 1708.
Dean & Ux'

v. Lord Delaware, S. P. — Ibid. 754. Mich. 1717. Stanton v. Platt S. P. — S. P. adjudged after solemn debate. 2 Wms's Rep. 327. Trin. 1729. by the Master of the Rolls. Cleaver v. Sparling.

10. If any child has any thing by the will more than the rest, which is declared as a satisfaction for her advancement, if she will claim the benefit of the custom, she must wave this; per Ld. Cowper. Hill. Vac. 5 Ann.

11. A free-man of London willing to prefer two daughters [215] beyond others, bequeathed to them a bond of 3000l. Afterwards by advice the clause was rased out, and the will re-published, and a new bond given in the name of J. B. in trust for the two daughters. Ld. Cowper held, that this bond must be brought into hotch-pot to intitle them to a further share. Ch. Prec. 269. Mich. 1708. Hedges v. Hedges.

Gilb. Equ.
Rep. 12, 13.
S. C. in to-
tidem ver-
bis. —
2 Vern.
615.
Hodges v.
Moor. S. C.

but contains only short notes thereof. — Though in this case some of the other children had given receipts, but knew nothing of their equitable right; Ld. K. Cowper declared, that this was but evidence, and that he would, notwithstanding, let them into their right, though otherwise, if there had been a receipt under seal. MS. Rep.

12. A. on his son B's marriage with C. covenanted in case of a second marriage to pay the first son by the first wife 500l. There was a son and several children besides, of the first marriage; per Cur. the heir must bring in the 500l. into a hotch-potch, though in nature of a purchaser under a marriage settlement. 2 Vern. 638. Hill. 1708. Phiney v. Phiney.

S. C. cited
2 Vern. R.
710. Hill.
1715. in
case of
Blandy v.
Widmore.

13. Bill by the plaintiff as only child of her father, a free-man of London, for her share of her father's estate, according to the custom of the city of London. The case was, the plaintiff at several times had received several sums of her father in his life-time, and her father transferred 1700l. bank stock in trust for himself, in order to dispose of it by his will to the defendants, &c.

MS. Rep.
Trin. 3
Geo. in
Canc. Stan-
ley v. Smith
and Nor-
cliff.

Quære, If the plaintiff shall put the money given her by her father in his life-time into hotch-potch, with the residue of the testator's estate, or whether she shall retain the money so given to her by her father, and have a moiety of the residue of her father's personal estate, (being an only child, and the testator having no wife) according to the custom.

Mr. Vernon for the plaintiff, insisted, that the plaintiff is intitled to a moiety of her father's personal estate by the custom without putting in hotch-potch, what was given her by her father in his life-time, she being an only child, and not fully advanced by her father in his life-time.

He cited the case of TURNER v. JENNINGS, lately in this Court, where it was resolved, that a child of a free-man of Lon-

don shall not put in hotch-potch what was given to her by her father in his life-time, and unless there be other children, and so it was resolved in Chancery, in the case of *DEAN v. LORD DELAWARE*, that an only child shall not put in hotch-potch where there is a widow, but shall have her customary share besides what her father gave her in his life-time. If the child be fully advanced in the father's life-time, the father may dispose of all his estate by will; so if the father marries his daughter in his life-time, and declares her fully advanced, without expressing what sum he gave with her in marriage, this is a full advancement by the custom, though not so in reality, and will bar her of her customary share, but if the certainty of the sum appears so given in advancement of the child, and it falls short of her proportion of her father's estate, then it shall be put into hotch-potch, and she shall have her customary share. Declaration of a full advancement by the father, is not a bar of the customary share in no case but that of marriage.

If a freeman of London has ten children, and fully advances nine of them in his life-time, the tenth child shall have the whole customary share belonging to the children.

[216] If it appears that an only child has received from his father in his life-time, as much as his customary share amounts to, this shall be taken as a full satisfaction of his customary share, but if it fall never so little short thereof, then it shall be taken as a gift from the father, and the child shall have his whole customary share, without any regard to it.

Note, Tracy J. who sat for Ld. Chancellor, ordered an account to be taken what money the plaintiff had received from her father in his life-time, and on what account, and referred the consideration, whether money given to her by her father in his life-time, should be taken in part of her customary share, or whether she should have a moiety of her father's estate over and besides what he had given her in his life-time, there being no other child. *Curia advisare vult.* MS. Rep. Trin. 3 Geo. in Canc. *Stanley v. Smith and Norcliff.*

14. A. having seven children makes an executor in trust, and devises to each child one seventh of his personal estate; one of the children dies in his life-time, and one of the six surviving children has been advanced by the father in his life-time; yet this child shall take his full share of the seventh part, without bringing what he had before received into hotch-potch. 3 Wms's Rep. 124. Hill. 1731. *Cowper v. Scot, & al.*

(B. 9) As to the Legatory Part, or Dead-Man's Share, whereof he may dispose as he pleases.

1. **T**HAT the customary part, belonging to the administrator of a citizen of London dying intestate, is not within the act of distribution of intestate's estates; because the custom of London being saved by the act, the customary part shall go wholly to the administrator.

ministrator, as it did before; and so it hath been resolved at common law, and in Chancery. 2 Freem. Rep. 85. pl. 94. cites it as resolved by Lord Keeper North. Hill. 1682. Anon.

2. An inhabitant of the province of York made a will, and devised a moiety of his estate to his wife; adjudged, that the widow should have three fourths, 2 Vern. 111, Mich. 1689, cites the case of North v. North.

3. Where a citizen of London, by will, had devised 700*l.* for mourning, the question was, whether this 700*l.* should come out of the whole estate, or only out of the legatory part? For it was insisted, if there had been no direction to the will, or if the will had only directed, that the expences of the funeral should not exceed such a sum, there the deduction must have been out of the whole estate. Per Cur. mourning devised by the will, must come out of the legatory part, and not to lessen the orphanage and customary share. 2 Vern. 240, Mich. 1691, Deakins v. Buckley.

MS. Rep.
Trin. 1
Geo. in
Canc. Read-
shaw v.
Duck, & al.

4. Upon hearing this cause, the Lord Chancellor ordered one of the masters to state a case, and send it to the recorder of the city of London, to certify to the Court the custom of the city. The master stated a case as follows (viz.) Thomas Anderson, a freeman of London, by his will directed, that an inventory should be taken of his personal estate by his executors, and that Barbara, his wife, should have her widow's chamber, and after his debts and funeral charges paid, gave her a third part of his personal estate, another third part he gave equally amongst his children Juliana, Hannah, Joseph and William, and Jane, who died in the testator's life-time, and remaining third part he gave as follows (viz.) 740*l.* to said Hannah, 40*l.* in small legacies, 200*l.* a piece to the said Joseph, William and Jane, and the overplus (if any) to be equally divided amongst four of his children, and to be paid them by his executors (viz.) to his sons at the age of 21 years, and to his daughters at the age of 21 years, or marriage. And if the third part of his personal estate in his dispose should, by bad debts or accidents, fall short, and not be sufficient to pay all his said legacies, he willed each of the said legatees should bear such loss (whatever it amounted to) in proportion according to their legacies, and made Duck, Chandler, Samuel Greenhill, and Thomas Greenhill, executors; Duck, Chandler, and Thomas Greenhill, only proved the will, and exhibited an inventory of their testator's personal estate into the Chamber of London, and entered into the usual recognizance, and paid Barbara, the widow, and the plaintiff Readshaw (who married Juliana) several sums on account of their customary shares. Thomas Greenhill died, and Duck having taken out administration to him, a bill was exhibited against Duck and Chandler, the two surviving acting executors, for an account of the testator's personal estate, and to have a distribution thereof, according to the custom and the will. The defendant Duck (who was become insolvent) was indebted 163*l.* 1*s.* 10*d.* as the balance of his own account, and 279*l.* 19*s.* received by his

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Customs of London.

intestate Thomas Greenhill, out of the testator's estate, making together 443l. 00s. 10d.

Quære, whether, by the said custom, the loss of the said freeman's estate, by the insolvency of his executors, ought to be borne out of the testamentary part of his estate only, or out of the whole personal estate only, as well customary as testamentary.

The same was certified as follows, viz.

" We the lord mayor and aldermen of the city of London, whose names are subscribed, do, in obedience to the said order by William Thompson, Esq; recorder of the said city, ore tenus humbly certify unto your lordship, that if a freeman of London dies, leaving a widow and children, his personal estate (after his debts paid, and the customary allowances for his funeral, and for the widow's chamber, being first deducted thereout) is, by the custom of the said city, to be divided into three equal parts, and disposed of as follows (viz.) one third part thereof belongs to his widow; another third part belongs to his children unadvanced in his life-time, and the other third part, such freeman, by his last will, may devise as he pleases. But where a loss of a freeman's estate doth happen by the insolvency of his executors, there is not any custom of the city of London which directs whether such loss ought to be borne out of the testamentary part of his estate only, or out of his whole personal estate, as well customary as testamentary. Dated the 26th day of April, 1715." This certificate of the lord mayor and aldermen, being sent to the Lord Chancellor Cowper, he, upon hearing counsel, was of opinion, that the widows and orphans of a freeman of London, are in the nature of creditors for two thirds of the personal estate he shall die possessed of; and that if any loss happen by the insolvency of his executors, such loss ought to be borne by the legatees of a freeman out of his testamentary part, and the same was decreed. MS. Rep. Trin. 1 Geo. in Canc. *Readshaw v. Duck & al'*.

[218] 5. A man made his will, and by it gave all his estate, according to the custom, having a wife and children, viz. two thirds to his wife, and one third to his children, with a devise over. Held per Master of the Rolls, that though this was not exactly conformable to the custom, yet his opinion was, that the devise of one third to the children was void, being what the custom gave, and so the devise over not good; that as the wife was to have two thirds, she shall take one third by the custom, and the other shall be the deadman's part; these proportions are to arise after a deduction of the widow's chamber, and her paraphernalia, i. e. such ornaments as she usually wore about her body; for though this is not by the custom, and was at first only allowed to citizens of the better sort, yet it is fit to give the same privilege to all citizens widows, Master of the Rolls. Trin. Vac. 1718.

6. If a freeman gives a legacy to his child, and disposes of his whole personal estate, the child shall not have both the legacy and the

the orphanage part, even though the legacy does not exceed the dead-man's part; Secus if the legacy be given expressly out of the testamentary part. But in no case shall the child be obliged to make his election, till after the account taken. 3 Wms's Rep. 124. in the note; cites 4 July 1718, at the Rolls, Hender v. Rose.

7. In this case it was held, that where a freeman of London made his will, and devised legacies to his children more than their orphanage part would amount unto, without taking any notice whatsoever of the custom, that these legacies shall be a satisfaction of their orphanage shares, to which they were intitled by the custom in the nature of a debt, and that the legacies shall not come out of the testamentary or dead-man's part, because it is held in this court, that they shall not take both by the will and the custom too; but where such legacies are less than their orphanage shares, whether they shall be pro tanto in satisfaction he was in great doubt, and sent it to the city to certify, though he seemed rather to think they should in this case take both, if none of the devisees in the will were thereby disappointed. Equ. Ab. 160. pl. 5. cites Trin. 1729, at the Rolls, between Nichols and Nicholls.

8. A freeman of London, by his will, charges 1500l. on his real estate for his daughter, and also gives her 1500l. out of his personal estate. The daughter would take the 1500l. out of the real estate (as that is not within the custom) and also claim her orphanage part; but the Court, in regard the testator had disposed of all his real and personal estate among his children, and intended an equal division, would not suffer the child to disappoint her father's will, but compelled her to abide intirely by the will, or by the custom. 3 Wms's Rep. 123. Hill. 1731. Cowper v. Scot, & al'.

(B. 10) Orphan intitled to what; and how; notwithstanding any Thing done in Fraud of the Custom.

1. A DEED of gift made to defraud the plaintiff of her customary part by the custom of the city of London was adjudged void. Toth. 113. cites 40 Eliz. Topp v. Topp.

2. A mortgage made to a citizen and forfeited to him shall be accounted part of the freeman's estate to be distributed, and shall not go to the heir. Toth. 131, 132. cites 7 Car. Ash v. Wood, and Maynard v. Middleton.

3. A citizen made a deed of trust of a lease to the use of his will, and he having two sons and a daughter, directed by his will his executor to convey the same to the two sons. Decreed that the deed is contrary to, and against the custom of London, and that the daughter ought, according to the custom, to have her part of the said lease and profits thereof. Chan. R. 84. 10 Car. 1. Not v. Smithies.

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Lev. 228. the reporter adds, *quære de ceo*.—It has been much questioned, whether a freeman's will can any way operate on the orphanage part? Formerly it seems to have been held, that a freeman had a power to appoint by will, that if any of his children should die within

4. A freeman of London devised, that his third part should make the customary part of his children 500*l.* a piece, if their customary parts did not amount to so much; and that if any of them died before twenty-one, his part should be divided amongst the survivors; all of them died before twenty-one, except the plaintiff's wife, her brother John being the last that died, and the plaintiff had received out of the father's part, as much as made his wife's part 500*l.* and the question was, if she should be intitled by the will if she should have John's part; it was objected that she should not, for it is not due by the will, but by custom, and she ought to administer to John to make a title, for the father had no power to appoint a survivor; but per Keeling Ch. J. though the father has no power to dispose the customary part from his children, yet he may appoint a survivor thereof among the children themselves by his will; and so Serjeant Wild, recorder of London, said, it was lately so resolved in Chancery, in a case where he was counsel; and so Keeling now directed the jury, who gave the verdict accordingly for the plaintiff for the whole. 1 Lev. 227. Mich 19 Car. 2. Hammond v. Jones.

age, then such child's part should go to the surviving child or children. 3 Wms's Rep. 318 in a note by the reporter, cites 1 Lev. 227. Hammond v. Jones, ruled by Kelyng Ch. J. at nisi prius, and said by Wyld, recorder of London, to have been so adjudged in Chancery. But lately it has been admitted to be otherwise.

S. P. because it is but a possibility, and not a thing vested in himself, per Maynard Arg. 2 Vent. 341. Mich. 22 Car. 2. said, that it was so resolved in case of Dr. Ent v. Adrian.

5. A citizen of London cannot devise over his child's part to another, in case the child dies under age. Chan. Cases, 199. Pasch. 23 Car. 2. Pate v. Hatton, als' Hutton.

6. A citizen of London being executor and residuary legatee dying, whether this being but a legacy, which till election rested prima facie in a legatee, not as legatee, but as executor, and the first testator's estate, which remains in the executor, as executor, shall not be subject to the custom as the executor's own estate? The Ld. Chancellor decreed the contray, and said, I will make election for him. Chan. Cases, 310. Hill. 30 and 31 Car. 2. Civil v. Rich.

7. If a citizen of London has a trust of a term attending his inheritance, and dies, the trust of the term shall not be subject to the custom of London to be divided between the wife and children, &c. as other personal estate and chattles shall; per Ld. Chancellor. 2 Freem. Rep. 66. pl. 77. Trin. 1681. In case of Tiffin v. Tiffin.

Skinn. 26. pl. 2. and 41 pl. 11. S. C. adjudged accordingly, and says, it

8. Where a citizen of London dies intestate, the third part of his goods belonging by the custom to his administrator is not subject to distribution by the stat. 22 Car. 2. cap. 10. for settlement of intestate estates. And it was granted by all, that by the custom of London the heir shall have his share in the distribution; and judgment

Judgment accordingly. 2 Jo. 204. Pasch. 34. Car. 2, B. R. was afterwards decreed in
Percival v. Crisp.

Chancery, that the administrator's part was within the custom, and not liable to a distribution upon the statute, and they relied upon this opinion in B. R. and that Trin. 35 Car. 2. where in a like case a suit was in the Spiritual Court for a distribution, a prohibition was granted. ———
a Show. 174. pl. 170. S. C. adjournatur.

* 9. If goods are absolutely given away by a *freeman of London* Pasch. 1689. 2 Vern. 98. Clerk v. Leatherland, referred to the recorder to certify.
in his life. This will stand good against the *custom*. But if he has it in his power, as by the *keeping of the deed*, &c. or if he retains the possession of the goods, or any part of them, this will be a fraud upon the custom. Per Cur. 2 Vern. 277. Mich. 1692. Hall, v. Hall.

10. *A. on marriage of M. his daughter to B. a freeman of London, settles a term for years in trust, that B. the husband should receive the rents till such time as W. R. and W. S. should otherwise appoint, and then to such person as they should appoint, and for want of such appointment, then for such as B. should by will appoint, and for want of such appointment then in trust for the executors and administrators of B.* The trustees made no appointment, so the question was, whether this term should go according to that appointment, or be looked upon as part of B's personal estate, and so go according to the custom, he being a freeman of London. And Ld. Keeper was of opinion, that it was not to be looked upon as *part of B's personal estate, because it never was in him*; but was settled by the wife's father, and therefore not subject to the custom. Abr. Equ. Cases, 151. Hill. 1702. Grice v. Gooding.

11. A freeman of London grants the greatest part of his personal estate in trust for himself for life, and then for his grand-children by his son, who was dead. A. has no wife, but has a daughter living. Decreed the deed to be set aside (A. not having entirely dismissed himself of the estate in his life-time, and being made a little before his death, is a donatio causa mortis) as the moiety belonging to the children, in this case, there being no wife, but as to the other moiety of which he had power to dispose (as having no will) the deed will stand good; per Cowper C. 2 Vern. R. 612. Trin. 1708. Turner v. Jennings.

12. A freeman of London had issue a son and daughter. The son died, leaving three children. The freeman assigns leases in trust to sell and pay any sum not exceeding 1000l. as he should appoint, and he by deed and will appointed 500l. to his daughter, and the residue to his grand-children. Decreed to be set aside, as to a moiety, which the daughter by the custom, as only surviving child, was intitled to, as being in fraud of the custom. 2 Vern. R. 685. Trin. 1712. Turner and Ux. v. Jenning and Longland.

13. The children of a freeman of London, where there is no wife, are intitled to a moiety, the other moiety being the dead-man's part; admitted by the counsel on both sides; and decreed, per Master of the Rolls. Wms's Rep. 341. Hill. 1716. Norhey v. Strangé,

14. A.

Ibid. 753. says, that this decree was afterwards affirmed in the House of Lords.

14. A. a freeman of London purchased an estate in the names of B. and C. and the consideration-money was mentioned in the conveyance to be paid by B. but no trust declared. A. dies, and some time after B. gave a declaration, that the purchase was made in trust for A. This is a good bar against the widow of A. who claimed a share of the money paid for the purchase, insisting that it ought to be looked upon as part of the personal estate of A. and consequently that a right vested in her by the custom to a share of this money in the hands of B. which could not be altered by such subsequent declaration of trust; but decreed against her; however considering all circumstances, the Court recommended it to the heirs or devisees of A. to agree to let the wife in for her dower of this trust estate. Wms's Rep. 321. pl. 82. Trin. 1716. Per Ld. C. Cowper. *Ambrose v. Ambrose*.

[221] 15. A leasehold estate devised by a freeman of London to a trustee for the separate use of his daughter shall not be taken as part of her orphanage part, but out of the legatory part; but if legatory part be not sufficient, the legatees must abate in proportion. 2 Vern. R. 754. Mich. 1717. *Stanton v. Plat*.

16. A freeman having a wife and one child (inter al') devised the orphanage part to the child, and in case of the child's death before twenty-one, then to go over to the testator's father; and it was held that this devise over was void, for that the father had nothing to do with the child's orphanage part, which came to him by the custom, not from the father; and were such devise over to be good, it would be a prejudice to the child who (in case there were but one child) might devise over such part at fourteen, which would take effect, were the child to die before twenty-one, or if he should die intestate and unmarried, it would go all to the mother as his next of kin, and not according to the father's will; or if the child marry and die within age, leaving issue, the widow and issue would be destitute, were such will to be good. 3 Wms's Rep. 319. in a note at the bottom cites Hill. 1718. *Biddle v. Biddle*.

17. Covenantee on marriage by a freeman to add 1500l. of his own money to 1500l. of his wife's to be laid out in land, and settled on the husband and wife for life, &c. is not to be looked upon as breaking into the custom. For the freeman might at any time during his life, even in his last sickness, have invested his personal estate in a purchase of land, which would defeat the custom, and stand good, though the freeman should at the same time have said, that he did this on purpose to defeat the custom. And this, if the purchase was real, would have held good to bar the custom. Per Ld. C. Parker. Wms's Rep. 532. Hill. 1718. *Babington v. Greenwood*.

18. A freeman having no wife and only one daughter, devised all his personal estate to his daughter, who was married, for her own separate use, and was enjoyed accordingly. The husband died. The representatives of the husband are not intitled to such part as was the daughter's customary share, but the whole belongs to the wife. Trin. 5 Geo. *Merriweather v. Hester*.

19. A freeman of London, before marriage, compounds with his wife for her customary part. The freeman dies, leaving children and the widow; the question was, whether the husband or the children should have the benefit, so as that the husband might by this means dispose of two third parts, scilicet his own third testamentary share and his wife's, or that his children would be entitled to a full half-part, as if the wife were actually dead? Ld. C. Parker declared his opinion in favour of the husband's right, but with a salvo as to the certificate, which might be made (if occasion should be) by the lord mayor and aldermen by mouth of their recorder. See Wms's Rep. 634. to 647. Pasch. 1723. *Blunden v. Barker*.

Wms's Rep. 644. in a note there at the bottom of the page says, that in the case of *GREEN v. GREEN*, heard at the Rolls Hill. 1718. Mr. Vernon observed, that on this point precedents had been both ways, though the

N. B. There is a note at the end of the case that the parties came to an agreement, so that these points were never certified. most solemn ones had been against the children's having the benefit of the composition, to which the Court inclined without then determining it. But says, that afterwards, in the case of *PUSEY v. SIR EDWARD DESBOUVERIE*, heard July 1734. Ld. C. Talbot taking notice of the contrary determinations made by the Court in this point, said it had of late been settled, that it should in such case be taken * as if there was no wife, and consequently that the husband should have one moiety, and the children the other. And says, that the like was held by Ld. C. Hardwick, June 18, and February 3, 1737. in cases of *MEDCALF v. IVES*, and *MORRIS v. BURROW*.

* Wms's Rep. 644. cites S. P. decreed July 8, 1714. in case of *Rawlinson v. Rawlinson*.—— S. C. cited accordingly. 10 Mod. 455.

* This point was adjudged at the Rolls after solemn debate. a Wms's Rep. 387. Trin. 1729. *Cleaver v. Sparling*.

20. A mortgage shall be paid out of the personal estate in preference [222] to the customary, or orphanage part by the custom of London; Arg. said to have been so determined; and the same was admitted by Ld. C. King, because the custom of London cannot take place till after the debts paid. 2 Wms's Rep. 335. Hill. 1725. in the case of *Rider v. Wager*.

The editor at the bottom of the page says, this was determined by Ld. C. Mac-

clesfield in 1790. in case of *Ball v. Ball*.

21. 11 Geo. 1. cap. 18. sect. 17. It shall be lawful for all persons, who after the 1st of June 1725, shall become free of the city, and for all who at that day shall be unmarried, and not have issue by any former marriage, to dispose of their personal estate.

22. Sect. 18. If any person who shall be free of the city hath agreed, or shall agree, by writing, in consideration of his marriage or otherwise, that his personal estate shall be distributed according to the custom of the city; or in case any person so free shall die intestate, his personal estate shall be subject to the custom of the city.

(C) Foreign Attachment.

[1. THIS is not a good custom. 21 Ed. 4. 67.]

2. A creditor of W. A. attaches his debt in the hands of W. S. who was indebted to the said W. A. and this being removed into B. R. by certiorari, a procedendo was prayed, but

Coke

Coke Ch. J. said, that where the *party cannot have the like remedy in B. R. as he may in London*, upon this custom of foreign attachment it ought to be remanded; and Doderidge said, that by way of bar we often allow such customs of London, as when a debt is recovered there by force of foreign attachment, and afterwards the debtee of him in whose hands it was attached, brings action for it, and the foreign attachment is *pleaded in bar*, we ought to allow it; but upon such custom by way of *original suit*, we cannot do right to the party, and therefore the procedendo ought to be granted, and this custom has very often been pleaded in our books; and this diversity was agreed by Coke Ch. J. and a procedendo granted. Roll. Rep. 268. pl. 42. Mich. 13 Jac. B. R. Croſſe's case.

The custom is, that the *ſheriff returns, that the debtor has nothing by which he may be summoned, and that he is not found in the city, and that he be demanded at the next court*, and then if he does not come, foreign attachment shall be awarded; Arg. Lat. 208. in case of *Hern. v. Stubbers*.

It lies against foreigners if the debtor be within the jurisdiction. Jenk. 139. pl. 84.

4. It was agreed by all, that a foreign attachment in London, is to no other purpose but to compel an appearance of the defendant in the action; for if he appears within a year and a day, and puts in bail to the action, the garnishee is discharged, but without bail they will not accept an appearance. Carth. 26. Pasch. 1 W. & M. in B. R. in case of *Andrews v. Clerke*.

[223]

Fol. 551.

(D) *What Persons shall be bound by this Custom, and in the hands of what Person a Debt may be attached,*

Cro. E. 410. [1. D. 8 Eliz. 247. 73. **T**OFT was indebted to Foxcroft, in the case of Snelling v. Norton, [which see infra pl. 2.] cites 8 Eliz. 274 [but it is misprinted, and should be as in Roll 247. pl. 73.] and denies it to below. — See the case of *Masters v. Lewis* infra.

and A indebted to the said Toft; Toft died intestate. The ordinary committed administration, and after Foxcroft sued the ordinary, and upon his default the debt of A. was attached by the custom, and after the administrator brought debt against A. who pleaded the attachment, and yet the plaintiff recovered, for that no action of debt lay as above against the ordinary, nor by the ordinary against A. dettee of the intestate, after the administration committed by any law; and some were of opinion, that at the common law no action lay against the ordinary, but by the statute of Westminster 2, cap. 19. which is within the time of memory, and therefore the custom cannot extend to it.]

Cro. E. 409. [2. Co. 5. Snelling 82. b, this last opinion is resolved not to be law, and resolved, That the administration is within another custom,

tom, to be charged for a contract, because he was chargeable at common law as an executor by his administration; and the name of the charge, scilicet, administrator is only charged by the statute, and yet in substance is all one; and it seems by the book, this custom is all one with a foreign attachment.] C. B. Snelling v. Norton, S. C. adjudged. Noy 53. S. C. adjudged accordingly. S. C. cited by Coke Ch. J. as adjudged, that an administrator may be within a custom, Quod fuit concessum per Doderidge that he shall be, but Haughton doubted of it: Roll. Rep. 105. in pl. 21. Mich 12 Jac. B. R. S. C. cited per Cur. a Jo. 204.

[3. If by this custom a debt be attached in the hands of B. B. may plead it in bar against his debts. 21 Edw. 4. 67.

4. But when an attachment is pleaded, the plaintiff may traverse the cause thereof, scilicet, that the defendant was not indebted to him who attached it. Mich. 12 Jac. B. R. by Coke, and by him there cited P. 40 El. B. R. Pain's case adjudged. Old Entries, Debt in Attachment. 1. Fol. 157. b. But note, this is upon the custom of London, within the year and day.] Cro. E. 599. pl. 4. Paramour v. Pain, S. C. and though it was objected that the debt is not now

traversable because it is recovered in London, Et non diffrationatur within the year and day, as it might be by the custom; yet it was held good per tot. Cur. For whether he was indebted or not is well issuable; for if he was not indebted, then they in London could not attach the plaintiff's debt by a foreign attachment for nothing; and Fenner said, that it was so ruled 22 & 23 Eliz. C. B. in one Bray's case. Mo. 703. pl. 99. S. C. but S. P. does not appear. S. C. cited by Coke Ch. J. Roll. Rep. 106. Cro. E. 830. pl. 37. Pasch. 43 Eliz. C. B. Coke v. Brainforth, adjudged that the debt is well traversable.

5. A foreign attachment lies in London against foreigners, if the debtor be within the jurisdiction. Jenk. 139. pl. 84.

6. A creditor of W. R. attaches money in the hands of the ordinary. Adjudged that it could not be, for a foreign attachment cannot charge any other person than the debtor himself, which the ordinary is not, before goods of the intestate come to his hands, [224] for no creditor of the intestate can sue him till he has actual seisin, and before such seisin he has so little interest in the matter, that he can neither release or bring the action; but goods in the hands of an executor or administrator, may be attached by a foreign attachment, because they are debtors; and yet by this means a debt upon simple contract may be paid before a debt upon specialty. 3 Salk. 49. Trin. 7 W. 3. B. R. Masters v. Lewis.

(E) What Debt, or Goods, may be attached by the Custom.

[1. SUCH goods cannot be attached, of which he had no property at the time of the attachment. 17 Ed. 4. 7. b. per Curiam.] Br. Debt, pl. 162. (163.) cites S. C. and was a debt of

100l. by bond indorsed for payment of 50l. of allom, and the defendant pleaded attachment by a stranger of the allom upon a plaint in London according to the custom; but the Court held this to be no plea, because it is of another thing which was not in demand; besides, the allom cannot be attached as goods of the plaintiff, because he has no property in them before they are delivered.

[2. If

[2. If *A.* be indebted to *B.* and *J. S.* a stranger, takes by tort certain goods of *A.* as a trespasser, *B.* cannot, by the custom, attach these goods in the hands of *J. S.* for the debt of *A.* because the property is out of *A.* at the time, and only a right in him. Trin. 4 Ja. B. R. between Stamere and Amony, adjudged.]

* 3 Bolk. [3. A legacy cannot be attached in the hands of an executor by foreign attachment, because it is uncertain whether, after debts paid, the executor hath assets to pay it. Mich. 14 Jac. B. R. between * Page and Lawketon and Davis, per Curiam resolved, and a consultation granted accordingly after a prohibition to the Ecclesiastical Court, where the suit was for a legacy. Mich. 4 Jac. B. R. between Scurra and Mercial, per Curiam, for that a legacy is not demandable nor suable at common law.]

* 3 Bolk. 248-249. Page v. Davis, S. C. & S. P. for it must be a certain debt to be within the custom, which a legacy is not, nor is it any duty, till all the debts are paid. — A legacy is not attachable by foreign attachment; per *Ld. K. Finch*. Chan. Cases, 157. *Hill*, 26 & 27 Car. 2. *Chamberlain v. Chamberlain*. — *Noy*, 115. *S. P.* per *Cur.* because it is a spiritual duty. *Amon*.

Roll. Rep. 205. pl. 21. S. C. — Calib. Rep. of the Customs of Lond. 27. S. C. [4. If *A.* be indebted to *B.* by obligation, and *B.* is indebted by contract to *H.* and *B.* dies, and his administrator demands the debt upon the obligation of *A.* who promises him, that if he will forbear him for a month, that he will pay him then, but he does not pay him accordingly; and after *H.* brings debt in London against the administrator upon the contract (as he may there by the custom) the debt of *A.* due by the obligation, may be attached in the hands of the administrator; for notwithstanding the promise * broke, yet the debt continued due by the obligation, and a recovery upon the obligation will be a bar of the action upon the promise, in which all should be recovered in damages. M. 12 Ja. B. B. between Spinke and Tenant, per Curiam.]

[225] S. C. cited Arg. 2 Show. 506. In pl. 468. Hill. 2 & 3 Jac. 2. B. R. [5. If *A.* lends to *B.* 100*l.* to be repaid by *B.* upon the death of his father, and after the death of the father of *B.* this 100*l.* is attached by force of a foreign attachment, and after *A.* brings an action upon the case against *B.* for this money; this foreign attachment will be a good bar thereof, though the custom be to attach debts, and this is an action upon the case, in which damages only are to be given, because this is a debt, and he might have had an action of debt thereupon, and therefore inasmuch as this was well attached, he shall not defeat it by bringing an action upon the case for it. Tr. 11 Car. B. R. between Sir Nicholas Hals and Walker, per Curiam, upon a demurrer upon a foreign attachment in Exeter, which is of the nature of an attachment in London.]

[6. If *A.* sells certain stockings to *B.* upon a contract for which *B.* is to give 10*l.* to *A.* and if he sells the stockings again before August after, that he shall give 2*d.* more for every pair of said stockings; the 10*l.* is attachable by foreign attachment, because an action of debt lies for it, but the 2*d.* for every pair of stockings is not attachable, because this rests only in damages to be recovered by an action upon the case, and not by action of debt, because it is made payable upon a possibility only. P. 11 Car. B. R. between Read and Hawkins, per Curiam, upon a demurrer, where an action upon the case was brought for the 10*l.* only, and the foreign attachment

attachment pleaded in bar; but the judgment was given against the defendant for the misleading the foreign attachment. *Intra-tur*, H. 11 Car. Rot. 78. but per Curiam, it had been a good bar, if it had been well pleaded.)

7. *Money paid to the sheriff of Exeter, in satisfaction of an execution in debt* not attachable in his hands. Le. 264. pl. 353. 19 Eliz. B. R. Anon.

8. A man may have money in his hands which is attachable, though it be no debt; as if he has money to keep, or if he finds the money of the debtor. Admitted. Cro. E. 172. pl. 13. Hill. 32 Eliz. B. R.

9. A debt of record as upon a judgment, &c. cannot be attached by the custom of London, and says, that so it was holden in the case of SIR JOHN PARROT, in C. B. And it was said by Cook, that such a debt could not be assigned upon the statute of bankrupts. 3 Le. 240. pl. 333. Trin. 32 Eliz. in the Exchequer. Sir Walter Waller's case.

10. A man indebted in arrears upon an *infirmal computaverunt*, in a sum certain, and promised to pay it at a certain day, but did not, and afterwards it was attached in London by the custom, &c. In a new action brought for the arrears in B. R. it was adjudged a good bar. Arg. Roll. Rep. 105. cites Mich. 37 & 38 Eliz. B. R. Wandifstone v. Humphrey.

11. Whether a debt upon a recognizance may be attached in London. Toth. 115. cites 38 Eliz. Skeggs v. Smith. D. 8s. b. Marg. pl. 7s. cites

Mich. 12 & 13 Eliz. Rot. 1640. Sir Roger Manwood's case, wherein it was agreed, that debt upon a recognizance might be attached; but cites 31 Eliz. GURLE'S CASE, wherein it was held, that debt upon a *statute merchant* cannot be attached.

12. Part of a debt may be attached by the custom of London; Ow. 2. cites per Warburton J. Godb. 196. pl. 282. Trin. 10 Jac. C. B. ss H. 6. 47. S. P. —

Sid. 317. pl. 7. Pasch. 19 Car. 2. B. R. in case of Robins v. Standard the Court held, that if there had been an attachment of 20l. out of the debt of 50l. it seems the defendant may plead this record of the attachment in London in bar pro tanto.

13. Attachment in London of a debt in *Middlesex*, is good. 2 Show. 507. cites Mich. 19 Car. 2. B. R. Mallum v. Herne.

14. An executor submitted to an award, and the arbitrators [226] awarded, that the plaintiff should deliver to the defendant certain Lev. 306. goods, and that the defendant should pay to the executor 350l. this Horley v. Turges, S. C. ad- money is not attachable in his hands by any creditor of his testator, it being not a debt due to the testator tempore mortis sue, and so judged. — not attachable as the testator's debt. Vent. 111. Hill. 22 & 23 2 Keb. 716, pl. 110. Car. 2. Horlam v. Turges. S. C. adjournatur. And.

231. pl. 20. adjournatur. And ibid. 741. pl. 42. adjudged. — S. C. cited Arg. 2 Lutw. 985.

15. A. is indebted to B. B. is indebted to C. and D. A. at B's request gives a note to C. for the money due from A. to B. afterwards A. let D. attach the money as due to D. from B. and on that attachment D. got a verdict, and judgment. Decreed the money to C. and that D. might take his remedy at law, and should assign his judgment to the fix clerk, &c. in trust for A. to reimburse him

him the money. Fin. R. 235. Mich. 27 Car. 2. Corderoy v. Carpenter, & al.'

Freem.
Rep. 207.
pl. 211.
Merchant
Adventu-
rer's Com-
pany, S. P.
according-
ly, and
seems to be
S. C.—
*Debt of a
corporation
is not at-
tachable,
because
there ought
to be three
capias's and
a non est
inventus re-
turned, &c.
s Show.
374. Arg.
Tria. 36
Car. 2. B.
R. Anon.*

16. On *debt brought in London against the Hambrough Company*, and they not appearing upon summons; and a nihil returned; an attachment was granted of debts owing to the company in the hands of 14 several persons. Per Cur. We are not judges of the customs of London; nor do we take upon us to determine, whether a debt owing to a corporation be within the custom of foreign attachment or not. This we judge and agree in, that it is not unreasonable that a corporation's debt should be attached. If we had judged the custom unreasonable, we could and would have retained the cause; for we can over-rule a custom, though it be one of the customs of London; that are confirmed by act of parliament, if it be against natural reason; but because in this custom we find no such thing, we will return the cause. Let them proceed according to the custom at their peril. If there be no such custom, they that are aggrieved may take their remedy at common law. We do not dread the consequences of it. It does but tend to the advancement of justice; and accordingly a procedendo was granted per North Ch. J. Windham and Ellis. (absente Atkins.) Mod. 212; pl. 45. Pasch. 28 Car. 2. C. B. Hambrough Company's case.

17. A. owed B. 2000l. A. borrowed 2000l. of P. to pay B. which sum A. was to receive of C. being the purchase money of lands in Somersetshire sold to D. but before A. received any of the money, he paid the 2000l. debt to B. Afterwards upon executing the conveyance by A. to D. he could not pay down ready money, but gave A. two bonds of 1000l. each, to be paid in half a year. A. delivered these bonds to P. which A. by P's direction, assigned to M. to the use of D. Afterwards Ld. H. attached this money in the hands of D. for so much due by A. to him. M. having an interest in the bonds by the assignment, refused to transfer that interest to P. the plaintiff, whereupon P. by bill prayed relief against this attachment, and to have the money, and for M. to transfer his interest in the trust of the said bonds, &c. Decreed, that D. pay the money to P. and P. upon payment, to deliver up the bonds to D. to be cancelled, and a perpetual injunction against Ld. H. and B. to stay proceedings on the attachment, or other proceedings at law for the money on the bonds, and M. to transfer his interest to the plaintiff. Fin. Rep. 299. Pasch. 29 Car. 2. Perrier v. Ld. Halifax, & al'.

18. If A. is indebted to B. who is indebted to C. and B. assigns the debt of A. to C. in satisfaction of his debt; now the debt due from A. is become the right and property of C. and B. hath nothing but in trust for C. and therefore it ought not to be attached for any debt of B. and upon the special matter shewed, the Lord Mayor ought to give relief; per Cur. 2 Jo. 222, 223. Mich. 34 Car. 2. Lewis v. Wallis.

19. Foreign attachment has not of any thing that sounds merely in damages, as covenant, &c. It lies not really of a debt contracted out of the jurisdiction, and in BROWN'S CASE there was pleaded a custom;

custom, in Exeter for foreign attachments of any debt, and do not pay accruing within the city, and so naught, and so adjudged by the Lord Hale. 2 Show. 373. pl. 359. Trin. 36 Car. 2. B. R. Anon.

20. It was always the custom in London to attach debts upon bills of exchange, and goldsmith's note, &c. if the goldsmith that gave the note, or the person, to whom the bill is directed, lives within the city, without any respect had to the place where the debt was contracted. Carth. 26 Pasch. 1 W. & M. in B. R. in case of Andrews v. Clerke.

For the debt always follows the person of the debtor, Ibid.—Comb. 109. S. C. but not clearly

S. P.—Show. 9. Clerke v. Andrews, S. C. but S. P. does not appear,

21. The arbitrators made an award that W. R. should pay so much money on the 2d day of January (he having given a bond to perform the award) that was attached on the 1st of January, and the money awarded was taken upon that attachment on the 2d of January. And per Holt Ch. J. this would have been a good plea in an action of debt brought upon the award, but not to an action of debt brought upon the bond of submission, because the bond is forfeited; and when a bond is forfeited, it is not the money in the condition, but the money in the bond itself which is attached. 3 Salk. 49. Hill. 13 W. B. R. Ingram v. Bernard.

Ld. Raym. Rep. 636. S. C. that the foreign attachment issued the same day that the money was payable by the award, and that by virtue thereof they

attached the money in his hands, the day after which, was the day after that the money was payable, by the award. Exception was taken, because, when the money was pleaded to be attached, the day of payment by the award (which is now parcel of the condition of the bond) was passed, and the bond forfeited, and so the penalty of the bond was due, and not the money awarded, and therefore that ought to be attached and not the other; it was answered, That the attachment was awarded on the very day, though not executed till the day after, and that it was their custom to attach denarios in manibus, and not the penalty. The Court held the plea ill. And Holt Ch. J. added, that if the attachment had been executed before the bond had been forfeited, it had been well; but though it was attached, yet, until it was executed, the defendant might pay the money to whom he would, and therefore not paying it according to the award, he forfeited his bond; and judgment accordingly for the plaintiff.

(F) [Foreign Attachment]

At what Time.

In what Cases it may be,

[1.] If a man recovers debt or damages in B. R. this debt cannot after be attached in London; for the inferior court cannot attach a debt in a superior court. P. 32 El. B. R. between * Kerry and Bowyer, per Curiam; and Tr. 32 El. after adjudged, and there is cited † Sir John Parret's case to be adjudged accordingly.]

* Cro. E. 186. pl. 9. Kerry v. Bowyer. S. C. which was, that the defendant recovered against the plaintiff, and a debt in B. R. and was indebted to the plaintiff in another debt which he attached in his own hands in London, and thereupon brought audita querela; but held clearly, that it did not lie; for this inferior court cannot fetch this debt out of B. R. and it is not attachable. [228]*

† Le. 29. pl. 35. Trin. 27 Eliz. B. R. Flood v. Perrot. S. C. adjudged, that a duty which accrues * by matter of record, cannot be attached by the custom of London. — Cro. E. 29. pl. 9. cites S. C. adjudged. — 3 Le. 240. pl. 333. cites S. C. as so held. — C. 10. E. 186. pl. 9. cites S. C. adjudged.

[2. *After an issue in an action of debt in B. R. the debt for which the action is brought, cannot be attached in London for the cause aforesaid.* M. 31. 32 El. B. R. the case of Fenner and Samuel is cited to be adjudged.]

Cro. E. 157.

pl. 41. S. C.

the defend-

ant pleaded

a foreign

attachment

in London after appearance, and pending the action; but after advisement it was ruled to be no good plea, but no cause was shewn, and the defendant had a day to plead peremptory, or a nihil dicit to be entered. — 3 Le. 238. pl. 318. S. C. adjudged no plea after imparlance.

The garnishee cannot plead to the jurisdiction after imparlance; for it is an admission of the jurisdiction; per Holt Ch. J. Comb. 109. Pasch. 1 W. & M. in B. R. Andrews and Clerk.

Show. 9. Clarke v. Andrews. S. C. & S. P. and prohibition denied. — Carth. 25. S. C. & S. P. and prohibition denied.

Debt upon

a bill obli-

gatory. The

defendant

pleaded a

foreign attachment in London, which was made whilst the suit was depending in C. B. and before he had any notice of the suit; it was the opinion of the Court, that whilst the suit is depending, it cannot be meddled with by any other, for it is quasi in custodia legis, and the Queen's court is interested therein, and therefore the attachment is not good. Cro. E. 691. pl. 28. Trin. 41 Eliz. C. B. Humphrey v. Barnes.

[4. *If a writ of debt returnable in banco be purchased before the attachment, it cannot, by the custom, be attached.* M. 5 Ja. between Arlston and Procter.]

[5. *But otherwise it is, if the writ of debt be purchased after the attachment by covin with an antedate.* M. 5. Ja.]

Ibid. 718.

713. pl. 36.

Mich. 41 &

42 Eliz.

B. R. the

S. C. and in

error

brought of

the judg-

ment, and

S. P. affirm-

ed there by

three Jus-

tices, (ab-

sente Gawdy) but it being also moved for error, that the custom alleged was, that the plaintiff should swear his debt, whereas the record is, that it is sworn by another, who was the plaintiff's attorney, it was held incurable, and the judgment was reversed. — S. C. cited by Crooke. Roll. Rep. 106. pl. 21. Mich. 12 Jac. B. R.

6. *A. is indebted to B. and C. is indebted to A. and B. brings debt in B. R. against A. pending this action, B. may affirm a plaint in London against A. for the same debt, &c. and attach the debt in the hands of C. For though a debt in London, for which there is a suit depending in B. R. cannot be attached, yet he that hath brought an action in B. R. may notwithstanding, according to the custom, attach the debt of the party; For the debt in question in B. R. is not touched by this attachment.* Cro. E. 593, pl. 34. Mich. 39 & 40 Eliz. B. R. Lewknor v. Huntley.

7. *W. was arrested by latitat for 1000l. on a bond. The money was brought into court; but before the return of the writ, an attachment issued in London against W. for divers sums; it was moved, that the money might be taken out of the court to satisfy the plaintiff, because B. R. had the priority of suit, but the Court made a rule to have it examined, and that if it appeared he was a debtor to those in London, before he became indebted to the plaintiff, that the money shall remain in court subject to the payment of their debts, and that the court should not be made a means to strip others of their just debts; and by Williams J. In case of priority of suit B. R. has always had the privilege and jurisdiction,*

Jurisdiction, and so it has been oftentimes adjudged. Bult. 217. Trin. 10 Jac. Ingram v. Sir Ed. Waterhouse.

8. There cannot be a custom for a foreign attachment, before there is some *default in the defendant*. Vent. 236. Hill. 24 & 25 Car. 2. B. R. Anon.

* 9. *If a suit be begun in B. R. or C. B. &c. no foreign attachment for a debt, &c. shall prevent the judgment of that court, nor shall it prevent the judgment of this court, &c. and therefore I confirm the decree made, and set aside the proceedings and judgment on the foreign attachment; per* Ld. Chancellor, 2 Chan. Cafes, 233, 234. Mich. 29 Car. 2. Anon.

10. *Bill of Middlesex prevents* an attachment as much as an *original*, because it is in lieu of one, and it is the foundation of the suit, and if laid to be *secundum consuetudinem curiæ* it will be a *bar*. 2 Show. 374. pl. 359. Trin. 36 Car. 2. B. R. Anon.

11. *A judgment was set aside* as irregular, and the money paid into the *hands of the defendant's attorney*; before he could carry it away, it was attached at the suit of A. on an action entered in the Counter. Per Holt Ch. J. let the plaintiff in the action in the Counter attend; it is a trick. Cumb. 427. Trin. 9 W. 3. B. R. Hayes v. Barnaby.

(G) [Foreign Attachment.]
At what Time it may be.

Fol. 553.

[1] **A**N obligee *before the debt is due by obligation*, cannot, by the custom, attach a debt for it, because he cannot affirm a plaint for the first debt before it is due. Tr. 32 El. B. R. between Dalton and Selby, agreed.]

[2. *But if B. is indebted to A. and C. is bound to B. but the day of payment is not yet come*, A. may attach this debt in the hands of C. before it is due to B. Tr. 32 El. B. R. between Dalton and Selby, said that the custom of London is so. But the Court said, this is not laudable nor to be allowed.]

3 Le. 236.
pl. 324. S. C.
held accordingly,
per tot. Cur.
—Cro. E.
184. pl. 2.

S. C. where the money was attached before it was due, but the judgment of the attachment was not till after it was held clearly void; because it was not due when attached.

[3. *But in such case, if it be pleaded, that such debt was attached by the custom, before the debt was due by the condition of the obligation, it ought to be specially pleaded, that, by the custom, such debt may be attached before the day of payment by the condition of the obligation*. Mich. 10 Car. B. R. between Alder and Clapper, per Curiam, upon a demurrer where the custom was alleged generally, as the use is in other cases for debts then due, and therefore the Court inclined it was not good. Intratur, Mich. 10 Rot. 328. Hill. 10 Car. this being moved again, the Court was of the same opinion.]

Noy, 68.
39 Eliz.
C. B. Rot.
1613. Mil-
nora v. Bo-
cher, S. P.

[4. *If A. lends money to B. to be repaid upon the death of the father of B. and after, an action is brought by C. against A. and*

after, the father of *B.* dies; the money due by *B.* to *A.* may after be attached in the hands of *B.* though it was not due at the time of the plaint commenced against *A.* inasmuch as it became due before the time that, by the custom, process is to be granted against him to whom he is indebted, [or as *Mr. Danvers* has altered it] “in whose hands it is attached.” Trin. 11 Car. B. R. between Sir Nicholas Halls and Walker, per Curiam, upon a demurrer upon a foreign attachment in Exeter, which is all one with an attachment in London.]

[230]

Jo. 406.
pl. 3. S. C.
resolved.—
D. 82. b.
pl. 72.
Marg. says,
that debt is
not attach-
able, pen-
dente pla-
cito was
twice ruled
in Basing-
ton's
case, Mich.
21 & 32 Eliz.

[5. A debt may be attached, by the custom, before it is due, but before it is due judgment cannot be given upon this attachment, that he shall have or retain it in satisfaction of his debt demanded before it is due; for thereby there should be an execution of this debt attached before it becomes due, which cannot be, for by the judgment it is put in execution presently. Tr. 14 Car. B. R. between Pierse and Calcott, adjudged upon a demurrer. Intratur, Mich. 13 Car. Rot. 473. But note, it was objected on the other side, that this was a good custom, because the judgment is not that the debt attached shall be paid presently, but only that he that is plaintiff, shall have it in satisfaction of his debt presently, but to be paid when it becomes due.]

and Trin. 41 Eliz. in C. B. and there vouched in the judgment. Pasch. 43 Eliz. C. B. Rot. 2421. Powell and Mallow v. Davis of Bristol.

Foreign attachment of a debt cannot be before the day is come. D. 82. b. Marg. pl. 72. cites Pasch. 27 Eliz. B. R. Skipwith's case. — S. P. per Cur. Cro. E. 713. pl. 36. Mich. 41 & 42 Eliz. B. R. in case of Leuknor v. Huntley.

(H) [Foreign Attachment.] In what Actions it may be.

Jo. 406.
pl. 3. S. C.
agreed, that
goods may
be attached
upon a fo-
reign at-
tachment,
and that
the value
ought to be
found before judgment,

[1.] IN an action of debt for tobacco in the detinet, a debt cannot be attached within the custom in satisfaction thereof, because it does not appear of what value this tobacco was, so that it might appear that the debt is but a satisfaction to the value, which cannot be supplied by a plea in bar made in another action against him in whose hands the debt was attached. Tr. 14 Car. B. R. between Pearce and Calcot, per Curiam, adjudged upon demurrer, intratur, Mich. 13 Car. Rot. 473.]

Fol. 554.

[2. But if the value of the tobacco had been averred in the record of the attachment, the debt might have been well attached in this action. In the said case of Pierse and Calcot not denied.]

(I) How the *Proceedings* may be in the Foreign Attachment.

[1. **W**HERE the *custom is to swear the debt*, it is no good custom if it be alleged, that the plaintiff swore his debt to be true, by himself, or by his attorney, for his *attorney cannot swear it to be a true debt*. Tr. 14 Car. B. R. between Pearle and Calcot, per Curiam, adjudged upon a demurrer, intratur, Mich. 13 Car. Rot. 473.]

Jo. 406.
pl. 3. S. C.
agreed accordingly.

2. The custom of London is, that where the goods of the defendant are attached in other hands, because the defendant is returned nihil in plaint of debt, whereby the plaintiff, upon the circumstance of the attachment recovers the goods attached, and has execution, that there, *if the defendant would dissolve the attachment, he ought to come within a year, and put in surety to answer the action*, or, if he cannot find surety, then to *render his body to prison*. Quod nota. Br. London, pl. 1. cites 20 H. 6. 3. [231]

Br. Privilege, pl. 6.
cites S. C.

3. A suit was in Exeter by *M. against H.* and the said *H. was returned nihil*; and it was *jurmised that T.* the plaintiff *had certain monies in his hands due to H.* whereupon *this money was attached to T's hands*, *T. pleaded nihil debet to H.* upon which *M. demurred*, and adjudged for him, *because he ought to have pleaded, that he owed nothing to H. nor had any money in his hands due to H.* upon which *T. brought error*, because it is a good plea, and the plaintiff was to be barred and not to recover, and that so is the common pleading in London; and the judgment was reversed. Cro. E. 172. pl. 13. Hill, 32 Eliz. B. R. Trols v. Mitchel.

Le. 321. pl. 452 Michil v. Hore, S. C. adjudged, and the judgment reverted in error.

4. *L. brought debt against H.* who pleaded, that *J.* in London affirmed a plaint against *A.* and by the custom there attached the debt demanded, in the hands of *H.* and alleged the custom, that the plaintiff should swear the debt, but the record is, that *the debt was sworn by a stranger*; this was held incurable, and so a judgment in C. B. was reversed. Cro. E. 712. pl. 36. Mich. 41 & 42 Eliz. B. R. Leuknor v. Huntley.

5. The custom is, that if any one is indebted to another, if he will enter his suit or plaint in the Counter of the Sheriff of London, that a precept shall be awarded to a serjeant at mace, to summon the defendant, and if he return nihil, viz. that he has nothing within the city by which he may be summoned & non est inventus, and if he be solemnly called at the next court, and makes default, that then, if he can shew that the defendant has goods in the hands of one within the liberty of the city, that the said goods shall be attached, and if the defendant makes default at four court days, being solemnly called, then if the plaintiff will swear his debt, and put in bail for the goods, that if the debt be disproved within a year and a day, or the judgment be reversed,

Ibid. 402, says, the debt ought to be affirmed on oath of the party in Curia Guildhall, Arg. cites it as so set forth in D. 196. b. [pk 42. Hill. 3 Eliz. in case of Harwood v. Lee.]—
that The de-

Customs of London.

defendant that he shall have judgment for the said goods. Godb. 400, 401, pleaded an attachment pl. 483. Pasch. 3 Car. B. R. *Hern v. Stubbs*. in London, and that he had found pledges to return the money if it should be deraigned within a year, and because *the pledges were not put in at the day of the last default, but at another day after*, it was holden no plea, and judgment was for the plaintiff. Mo. 570. pl. 779. Hill. 33 Eliz. B. R. Anon.

6. It was ruled, that if A. brings debt in London against B. and attaches goods of B. in the hands of C. from whose possession the goods are not removed; and B. by certiorari brings the cause into B. R. and puts in bail, the attachment is at an end, and C. ought to deliver the goods to B. which, if he does not, B. may have trover or replevin; but B. R. will not compel him to deliver them, because he is no party in court, and all things are as if there never had been an attachment. 12 Mod. 213. Mich. 10 W. 3. Loveridge and Whitrow.

[231]

(K) [Foreign Attachment.]

Who shall have it, and against whom.

* Cro. E. 186. pl. 9. S. C. and see (F) pl. 1. S. C. and the notes there. [1. IF A. recovers debt against B. in London, B. may attach this debt in his own hands for so much due to him. Pasch. 32 El. B. R. between * Kerry and Bowyer, admitted. Trin. 32 El. B. R. same case admitted. Mich. 11 Jac. B. between Lopas and Holman.]

Roll. Rep. 105. pl. 21. S. C. & S. P. per Coke Ch. J. according to which Doderidge J. agreed, but Haughton J. doubted. [2. A debt due to an administrator may be attached within the custom, for an administrator is within the custom. Mich. 12 Jac. B. R. between Spinke and Tenant, per Curiam.]

[3. If in bar of an action a foreign attachment is pleaded, that the custom is, that if any man brings his action against another for any debt, and upon a return made, that he non est inventus, & quod nihil unde, &c. and thereupon surmises, that any other is indebted to the defendant in such a sum, and thereupon pray process to attach the sum in his hands, and to defend, ita quod the defendant appears to answer the plaintiff, and the serjeant returns that he hath attached him to defend the sum in his hands, and the defendant does not appear at four courts after, &c. that judgment shall be to recover it in his hands, &c. this is no good custom, without a surmise that the stranger who is indebted to the plaintiff is within the jurisdiction of the court, and the return of the serjeant is not sufficient that he hath attached him to defend it in his hands, for perhaps the serjeant intends that he may attach the debt in his hands, though he be not within the jurisdiction of the court, and his return shall not bind the party, without an actual surmise thereof by the party himself. Trin. 11 Car. B. R. between Sir Nicholas Halse and Walker, adjudged upon a demurrer, where a foreign attachment in Exeter was pleaded, which was all one with the

the custom of London, and all customs there confirmed by parliament in the time of Queen Elizabeth.]

[4. The custom of London is, that *if any plaint be affirmed in London, before, &c. against any man, and it is returned nihil, if the plaintiff will surmise, that any man within the city is debtor to the defendant in any sum, he shall have garnishment against him* for him to come in to answer, if he be indebted in the form as the other hath alleged, and if he comes, and does not deny it, then this debt shall be attached in his hands, &c. So note, that the plaintiff ought to surmise, that the other man who is indebted to the defendant is within the city, 22 E. 4. 30, per Starkey, the recorder of London, the custom so certified.]

Br. Customs. pl. 73. cites S. C.—
Br. Barre, pl. 90. (92.) cites S. C.—
Fitz. Customs. pl. 3. cites S. C.

[5. *Whether the custom of foreign attachment holds between a citizen and foreigner.* Quære. D. 3 El. 196. 42.

6. A citizen of London was indebted to a foreigner upon bond, and the foreigner was indebted to the citizen upon a simple contract; the foreigner died, and upon oath made by the citizen, that his debt was a just debt, he levied a plaint in London, against the executor of the foreigner; * and upon four defaults recorded, he had judgment, and then he attached the debt in his own hands, finding juries, that if the debt was not disproved by the executor within a year and a day, or the judgment reversed, that then he should be discharged of so much of the debt which he owed on the bond; the question was, whether this custom did extend to foreigners, as well as to citizens? It was not resolved, Dyer, 196. b. pl. 42. Hill. 3. Eliz. Harwood v. Lee.

[233]*
C. was indebted to G. by bond for 100l. and G. was bound to C. for 200l. both which bonds were forfeited, and the said C. in London made attachment of the debt of 100l. in his own

hands for the said debt of G. and had judgment thereupon accordingly, and afterwards assigned this obligation to the Queen, &c. D. 196. b. Marg. cites Trin. 18 Eliz. Chamberlain v. Gresham.——Ibid. cites 43 Eliz. in C. B. that it was said for law per Cur. that a man by the custom of London cannot attach a debt in his own hands; for that which is in his own hands cannot be said attached; and it was said also, that the custom is good only between citizens, and not to extend to strangers.

7. Goods were attached in the hands of the Exeter carrier, who is then *privieged in the Common Pleas, by reason of an action there depending*; per tot. Cur. the attachment ought to be dissolved, and the privilege to all goods for which he is answerable to others. Le. 189. pl. 268, Mich. 31 and 32 Eliz. C. B. Edwards v. Tedbury.

(K, 2) Foreign Attachments, Pleadings in General.

1. **C**USTOM of London was in issue, and the trial thereof there, and exception was taken, that allowance thereof ought to be shewn of record; and the opinion of the Justices was, that he is not bound to shew allowance thereof another time by record; quod nota, that of custom there *needs no allowance.* Br. Customs, pl. 42, cites 5 E. 4. 30.

S 4

2. In

Mo. 703.
pl. 979. S.C.
but not S.P.

2. In *debt* the defendant *pleaded a foreign attachment*; the plaintiff *replied, that he was not indebted to the defendant in any sum*; and this was held a good replication, because it is *issueable, whether he was indebted or not*; for if he was not indebted, then he could not be attached. Cro. E. 598. pl. 4. Hill. 40 Eliz. B. R. *Paramour v. Pain*.

Godb. 400.
pl. 483.
Paich. 3 Car.
Hern v.
Stubbs, S.C.
adjournatur.

3. In *detinue* for goods plaintiff declared, that he delivered them to re-deliver *quando requisitus, &c.* but that defendant had not delivered them *licet sæpius requisitus, &c.* Defendant *pleaded the custom of foreign attachment in London; whereupon they were recovered there against him.* Plaintiff demurred; 1st, *Because the cause of the debt, on which the attachment was, is not shewn; nor is it averred expressly, that there was any debt*; to which Stone, for the defendant, replied, that the cause of the debt shall not be shewn, because it is only inducement, and not traversable. 2dly, *Exception was, that the custom is, if he swears his debt to be true, &c.* but here it is *alleged, that he swore his debt, but did not say, that he swore it a true debt.* Stone replied, that this shall be intended. 3dly, *That it is not shewn that the debtor was within the city at the time.* 4thly, *The custom is, that if the sheriff returns that the debtor nihil habet, by which to be summoned, and that he cannot be found within the city, and be demanded at the next court, that then, if he does not come, foreign attachment shall be awarded*; but in this case, none of these points were averred, viz. that the sheriff returned, &c. Stone answered, that this was true, and therefore the judgment is erroneous, but that we cannot take advantage of it, being strangers, &c. At length the Court seemed of opinion against Stone in all points; sed adjournatur. Lat. 208, 209. Mich. 2 Car. Hern v. Stubbs.

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4. A foreign attachment, in an inferior court, was pleaded in this manner; (that by custom time out of mind) whoever levied a *plaint pro aliquo debito* against another upon surmise; that a stranger was indebted to the defendant, that process issued forth to attach, &c. The Court said, that they need not express that the debt did arise *infra jurisdictionem*; for perhaps it did not. And yet if an action be brought in such case, and the debt be laid to be contracted *infra jurisdictionem Curie, if the defendant will plead to it he may*; but he shall never be admitted to assign for error in fact, that the debt did arise *extra jurisdictionem Curie*. But if he had tendered such a plea in the inferior court upon oath; then, if they had refused it, it would have been error. Wherefore it is enough in this case to say, that a *plaint* were levied *pro aliquo debito infra jurisdictionem*, without averring, that the debt did arise within the jurisdiction. Vent. 236. Hill. 24 and 25 Car. 2. B. R. Anon.

5. Debt on a bond; the defendant pleads, that the plaintiff being indebted unto J. S. he made an attachment of the said money in his hands; the plaintiff demurs; two exceptions were taken, because, 1st, *It does not appear that the debt arose within the jurisdiction.* 2dly, *That the attachment pleaded was made before the money was payable by the bond.* It was answered as to the first, that

that there is a great difference where a man is plaintiff in an action, and the defendant here, who was a third person, who is no ways privy, and could not allege, that he that is plaintiff here, was a defendant below; and the precedents are all without it, as may be seen in Coke's Entries, Tit. Debt. And as to the other matter, it is *debitum in presenti*, though solvend. in futuro; and it may be attached before it is payable, though it cannot be condemned till after. 2 Show. 506. pl. 468. Hill. 2 and 3 Jac. 2. B. R. Self v. Kennicott.

6. In case of a foreign attachment, the garnishee cannot plead to the jurisdiction *after an imparlance*; for an imparlance is an admission of the jurisdiction; per Holt Ch. J. Comb. 109. Pasch. 1 W. and M. in B. R. Andrews v. Clarke. Show. 9. Clarke v. Andrews S. C. & S. P. Carth. 25. S. C. & S. P.

7. Upon a foreign attachment the garnishee pleaded to the jurisdiction of the sheriff's court; but it was over-ruled. Carth. 25. Pasch. 1 W. and M. in B. R. Andrews v. Clarke. Show. 9. Clarke v. Andrews, S. C. argued by the re-

porter for a prohibition, but says, that Dolben was angry, and said, that no man would have made such a motion but the reporter himself, and wondered that he who had been concerned in the city should have made such a motion; but that Holt said, there was reason in it, but the pleading of it was after imparlance, and so they came too late, it not being pleaded in time; and a prohibition was denied.

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(L) *Pleader of a Judgment in a Foreign Attachment, in Bar of an Action in other Courts.*

Fol. 555.

[1. BY the custom of a foreign attachment of London, if A. sues B. in London, &c. and C. is indebted to B. in the same sum, and the said C. is condemned there to A. according to the custom, and judgment given against him accordingly; yet if no execution be sued against C. A. may resort to judgment and execution against B. his principal debtor, and B. may sue C. for his debt, notwithstanding the unexecuted judgment. D. 7 E. 6. 82. 72. by Brook, recorder of London, this certified to be the custom of London.]

[2. In bar of an action brought in B. R. if the defendant pleads a judgment in a foreign attachment in bar, and alleges the custom to be, that if the plaintiff in the court hath process against the defendant, and upon a nihil returned, makes a surmise that B. is indebted in so much to the defendant, and upon his prayer to attach it in his hands by process, and he does it accordingly, and if the defendant makes default at four courts after that, by the custom, at the last of the said four courts, the plaintiff may pray process against B. to come in and shew cause wherefore the judgment should not be against him at the next court after; and when he comes to apply this custom to his case, he shews that there were four defaults, and that at the fourth default the plea was continued for several courts, and then process went against B. and then after judgment against him; this is not warrantable by the custom, inasmuch as he shews, by

by the custom, it ought to be at the next court after the four defaults. Trin. 11 Car. B. R. between Sir Nicholas Halls and Walker, per Curiam upon demurrer adjudged.]

Br. London,
pl. 9. cites
S. C.

3. Debt by T. C. and R. C. upon an obligation against R. D. of 32l. and as to 18l. parcel, &c. he pleaded that M. brought debt in London against the said R. C. of 18l. who was returned nihil, by which 18l. parcel of the 32l. was attached in the hands of the defendant, as the debt of the said R. C. by the custom, which is where the defendant has divers debtors, &c. and is returned nihil, that he shall attach it, and have execution, &c. See the pleading of the foreign attachment, by the custom of London, Libro Intrat. For it is illy pleaded here, and because he *alleges the custom to be divers debtors*, and in the subsequent *shews but one debtor*, therefore per judicium, the plaintiff recovered, quod nota, but it was held by the Justices, serjeants, and apprentices, that if the custom had been well pleaded, that this had been a good bar, though the *action be brought by R. and T. and the attachment was made as of debt due to R. only*; for in debt to two, the one of them may discharge it intirely by his release, acquittance, or consufance in Court of Record, &c. For bar against the one, of all, or of parcel, is good against both; for such record against the one, is as strong as if the one had released, quod nota. Br. Dette. pl. 100, cites 22 H. 6. 47.

[236]*
Fitzh. Cust.
tom, pl. 5.
cites S. C.—
Jenk. 138.
pl. 84. S. C.
by the name
of Bowler
v. Collins,
says, that a
custom
ought to be
precisely
pursued,
and that
though
judgment
was given in
this case,
there was
no occasion
of a writ of
error; for
the custom
not being
pursued by
the plead-
ing, the
judgment
was void;
for there is
no such
custom, and
London has
no jurisdic-
tion in such
case but by
custom.
This suit of

4. In debt by A. against B. the defendant said, that J. S. brought writ of debt in London against A. the now plaintiff, of 108l. which was returned nihil, and he made default, whereupon after four defaults recorded, J. S. surmised, that B. the now defendant was indebted to A. the now * plaintiff, in the like sum now in demand, and prayed garnishment against the now defendant, and bad it, and pleaded the custom of London of foreign attachment certain; whereupon it was awarded, that J. S. recovered the sum against the defendant, and that he be discharged thereof against the now plaintiff, and that such recovery and judgment shall be a bar against the first debtor, as this plaintiff then was, judgment si actio. The plaintiff replied, that there was no such custom in London, and thereupon it was wrote to the mayor and aldermen to certify the custom, who *certified as above, and farther, viz. that after judgment and execution had of the sum attached, the defendant shall be discharged of this sum against the first debtor*; whereupon the plaintiff demanded judgment, it being now certified in effect, that there was no such custom, that judgment only shall bind without execution, Vavisor alleged, that this was a jeofail, and that no such custom is no plea, inasmuch as the plaintiff does not deny but that such judgment was given in London, and consequently the record being in force, he shall be bound by it, and shall not avoid it by plea, but shall be put to his writ of error; and Brian said, that he has failed of his record here; and by him and Choke, and Hufsey, the plea of the recovery is not good without the custom, and therefore the plaintiff may *traverse the custom*, and the rather because it arises upon custom, and not on the common law, and divers cases put there, that if the matter had passed

passed upon matter at common law, and erroneously, that in such case the record is good and pleadable so long as it stands in force, and the party shall not avoid it by plea, but by writ of error, but *e contra* where it arises upon custom, there he may avoid it by plea, that no such custom; but Catesby and Townsend held *e contra*. But Brook says, that the best opinion seems against them, and cites 21 E. 4. 67. Br. Barre, pl. 90. (92.) cites 22 E. 4. 30.

Bowler v. Collins was in C. B. if the custom had been well pleaded, the Judges of C. B. ought to allow it for a good bar;

but if B. had sued C. in London this judgment would have barred him, until it was reversed by error in London, before the mayor and aldermen in the hustings.

5. *After debt brought, the plaintiff attached in London a debt due by another man to the defendant, and had judgment to recover; adjudged a good bar to the action for so much.* Mo. 598. pl. 820. Pasch. 36 Eliz. May v. Middleton.

6. Whether an attachment made of a debt in London may be pleaded in bar of a *scire facias* upon a recognizance in this court, it hath been over-ruled in law it cannot. Toth. 115. cites 38 Eliz. Skeggs v. Smith.

7. *Debt by an administratrix upon a bond of 26l. made to the intestate.* The defendant pleaded, that he brought debt of 30l. against the plaintiff by the name of administratrix to her husband in London, and that upon nihil returned the debt was attached in his own hands. It was adjudged no plea, because non constat by the bar that the debt recovered in London was the testator's debt, but only that she was sued by the name of administrator, which she might be for her own debt, and then the intestate's debt cannot be attached for her proper debt, and it is not shewed that the debt in London was by specialty, otherwise it is not demandable against an administrator; besides, the judgment in London was, *de bonis propriis*, which cannot extend to goods of the intestate's. Adjudged for the plaintiff. Cro. E. 843. pl. 25. Trin. 43 Eliz. C. B. Hodges v. Cox.

8. Debt upon an obligation; the defendant pleads a foreign attachment in London, and the plaintiff demurs, and the exceptions were, first, that the defendant had attached the monies in his own hands by way of retainer, and so the custom unwarrantable. 2dly, It appeared that judgment was given in the Mayor's Court, by the default of him in whose hands the money was attached; and it appeared that the defendant, which brought the action in London, and he in whose hands the attachment was made, and that made default, was the same person; and it is a contrariety, that the same person should appear and not appear, and a prescription for that is naught; and the custom is in London, that the recoveror in London ought to find sureties, that if the debt be discharged within a year and a day, then to pay the money, and it did not appear by the record that he found sureties, which was an incurable fault, and so adjudged by the Court. Brownl. 60. Mich. 10 Jac. Hope v. Holman.

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8. Debt upon bond conditioned to pay 50l. before such a day; the defendant pleaded the custom of London of foreign attachment, (*viz.*) that where a man is indebted to another, and that

debtor

2 Keb. 132. pl. 93. S. C. adjournatur. Ibid. 141. pl. 59 S. C.

it was moved for the defendant, that the custom of London is specially alleged to attach any debt due to a person sued, and this is a duty, when attached, though not payable till after, to

which the Court inclined; sed adjournatur. — Ibid. 202. pl. 36. S. C. all the Court conceived the custom sufficient, and well alleged; and judgment for the defendant, nisi. — S. C. cited Arg. 2 Show. 506.

debtor hath money due to him from one in London, that the creditor may attach it before it is due to him, and that such a creditor of the now plaintiff did attach 50l. in the defendant's hands before it was due to the plaintiff, and gave security, according to the custom, to repay the debt, if it should be disproved within the year and a day, &c. and that on such a day (which was after the day in the bond) he paid the 50l. to the creditor upon a scire facias brought against him according to the custom, &c. and upon a demurrer it was insisted that it is not a good custom to attach money before it was due; but adjudged, that it was; for *though it might be attached as a debt, it could not be levied before it was due*; and so the custom was laid. Sid. 327. pl. 7. Paich. 19 Car. 2. B. R. Robbins v. Standard,

9. *Assumpsit by administrator upon indebitatus for 30l. for wares, sold by the intestate, the defendant pleaded that after intestate's death, and before administration granted, he affirmed a plaint in London against the Archbishop of Canterbury, (to whom the granting the administration belonged) in trespass on the case, on assumpsit of the intestate to the defendant for 30l. mutuo dat' by the defendant to the intestate, and upon process against the archbishop the return was, that nihil habet nec est inventus, &c. and then shewed the custom of London of foreign attachment, and that himself owed the intestate 30l. which he had in his hands, and prayed attachment of the said monies in his hands according to the said custom, and alleged the condition, proceedings, and judgment in good form, as usual in such case, and then concluded judgment si aëlio. But it being shewn, that the custom is alleged, that if the debtor dies intestate, and a plaint be affirmed against the administrator, and if process against him be returned, that nihil habet nec est inventus, &c. that the custom is not pursued in the plaint affirmed against the archbishop, and then the judgment founded upon this custom is void; quod fuit concessum. Per tot Cur. Raymond absente. And resolved that the defendant's plea was insufficient, and that the judgment upon the foreign attachment was not any estoppel to the plaintiff here, he not being a party thereto. And judgment for the plaintiff, 2 Jo. 166. Mich. 33 Car. 2. B. R. Smith v. Ridges.*

10. *If money be attached and paid thereon, and afterwards the original creditors sue for the same, if the attachment happens to be ill pleaded, or otherwise avoided, the party must pay the money over again, and has no remedy neither in law, or equity. 2 Show. 374. Trin. 36 Car. 2. B. R. Anon.*

[238] 11. *In assumpsit, evidence was given that the debt was attached by the custom of London before the action brought, and condemnation had there before plea pleaded. It was urged that this should relate to defeat the action; but it was ruled that if an attachment and condemnation be before the writ purchased, it may be given in evidence on the general issue, because that is an alteration*

alteration of the property before the action brought; but if the attachment only be before the writ purchased, it ought to be pleaded in abatement of the writ, and if the *condemnation* be after the action commenced and before the plea pleaded, then it may be pleaded in bar, but shall not be given in evidence on non assumpsit; for the property is not altered by the condemnation. Coram Holt Ch. J. in Middlesex, 1 Salk. 280. Pasch. 5 W. 3. Brook v. Smith.

12. In *pleading* a foreign attachment, it *must be that the defendant* (in the action in London) *was attached* by the money in the garnishee's hands, and not that the garnishee was attached by the said money. Carth. 282. Trin. 5 W. & M. in B. R. Lawrence v. Atherton.

13. We cannot take notice of a judgment upon the custom of foreign attachment in London, without the custom be *specialy shown*; per Holt Ch. J. 12 Mod. 407. Trin. 12 W. 3. Anon.

(L. 2) Defendant arrested. In what Cases; and when He may be.

[1.] 3. CO. 9. Machally 68. b. resolved by all the justices and barons, that *after the plaint entered in the book of the porter of London, and before the entry thereof in the court before the sheriff*, the defendant may be arrested by the custom of London.]

[2.] [4. By the custom of London, after the plaint entered as in the said case before, *or before the plaint entered, if it be afterwards entered, any serjeant ex officio, at the request of the plaintiff, may arrest the defendant* absq; aliquo præcepto ore tenus vel aliter, and this custom was allowed to be good by all the justices and barons. Co. 9. Machally 67, 69. b.]

[3.] [5. By the custom of London, *after a plaint entered as before, the defendant may be arrested by his body, by a precept in nature of a capias ut supra, before any summons*, and yet it is allowed to be a good custom by all the justices and barons, inasmuch as it is established and confirmed by parliament. Co. 9. Machally 68.]

[4.] [6. Co. 9. Machally 69. b. it was *objected*, that the custom of London is not good, in *that the entry of the plaint* upon which the party was arrested ut supra, *was without form, and so short and obscure*, that opus est interprete. But by all the justices and barons the custom is allowed, for that this was but a short remembrance to draw the declaration at large afterwards in the Court of Pleas, which, by the custom, is sufficient to arrest him.]

(M) What Persons shall be *within the Custom*
[Of London in General.]

Cro. E. 409. [1. **C**O. 5. Snelling 82. b. adjudged, that when the *custom* is
pl. 21. Trin. *that if two citizens of London makes a contract, and*
37 Eliz. *that he that ought to pay the money dies, his administrator shall be*
* Fol. 556. *bound to pay it as well * as if it were by obligation, that this is a*
C. B. Snelling v. Norton, S. C. *good custom, because the administrator was chargeable at common*
adjudged. *law; and by the statute the name of charge is only changed, but*
— Noy *the substance remains all one; and resolved also, that the stranger,*
53. S. C. *which is no citizen, after such debt recovered against the adminis-*
adjudged *trator by a citizen, shall be bound by this custom.]*
accordingly. — S. C. cited by Coke Ch. J. as adjudged, that an administrator may be within
a custom, Quod fuit concessum per Doderidge that he shall be, but Haughton J. doubted. Roll.
Rep. 105. pl. 21. Mich. 12 Jac. B. R. — S. C. cited per Cur. 2 Jo. 204.

* Br. Devise, [2. * 11 H. 7. 21. cited in D. 8. 9 El. 255. 3. Fitzwilliams,
pl. 51. cites S. C. for it Recorder, certified, that by the custom of London, a foreigner, as
is a custom which goes well as a citizen and freeman of London, may *devise his lands or*
with the tenements *in fee.* 5 H. 7. † 10. and † 19. per Brian.]

land. — Fitzh. Custom, pl. 7. cites S. C. † S. P. so that it be *10 laymen*, as appears in the
case of JOHN ERMLEY OF GRAYS-INN; for it seems that the custom is annexed to the land, and
not to the person of the owner. Br. Customs, pl. 41. cites 5 H. 7. 10. — Fitzh. Custom, pl. 8.
cites S. C.

† Br. Devise, pl. 22. cites S. C. — Fitz. Custom, pl. 8. cites S. C. — 3 Bull. 16. Doderidge
J. cited 5 H. 7. 10. and 19.

Br. Devise, [3. Doctor and Student 21. there is a custom in London, that
pl. 22. cites freemen there may, by their testament enrolled, devise the lands
5 H. 7. 19. of which they are seised *to any, except in mortmain*; but 30 H. 8.
S. P. by S. 132. in London a man may by testament devise to a common
Brian. — person, though the testament be not enrolled.]
Ibid. pl. 28. cites 30 H.
8. S. P.

* Br. Customs, pl. 41. [4. * 5 H. 7. 10. and † 19. b. per Brian, none may devise *to*
cites S. C. *guilds and corporations* in London, unless he be a citizen and free-
— Fitzh. man, and [then] he may. D. 8. 9 Eliz. 255. 3. intended, that
Custom, pl. this devise is to be made to a corporation within the city only, and
7. cites S. C. not out, and made a quære.]
† Br. Devise, pl. 22. cites S. C. — Fitzh. Custom, pl. 8. cites S. C.

[5. Vid. D. 8. 9 El. 255. 7. *Devise of lands in London is*
Trinity College in Cambridge, and by all the justices 'tis good by
the statute of 1 and 2 P. M. and nothing is said of the custom.]

Br. Customs, pl. 35. [6. Doctor and Student 21. *citizen and freeman* may devise *in*
cites 28 Aff. *mortmain.* 30 H. 8. S. 132. And he that makes such devise,
25. that this ought to be a citizen and freeman, and *ought to be resians.*]
power in

London to devise in mortmain was by grant of 1 E. 3. — But though they may devise in mort-
main, yet they cannot alien in mortmain. Br. London, pl. 13. cites 24 E. 3. 71.

[7. 45 Ed. 3. 26. b. adjudged, that a *citizen not resiant, taxable, or inheritable, cannot* devise to St. Mary-Overy in mortmain; and there it is said, that so it had been adjudged before this time. * 38. Aff. 18. adjudged.]

Br. Customs, pl. 7. S. P. but is misprinted in the large edition, and

there cited as 46 E. 3. 13. which should have been at pl. 8. in that edition, and pl. 8. there is cited as 45 F. 3. 26. which should be vice versa.

* Br. Customs, pl. 36. cites 38 Aff. 17. a man impeached for mortmain in London *said, that the custom of London is, that every citizen may devise his land in London as well in mortmain as otherwise, and that every one who has land in fee in the same city is a citizen, and C. was seised in fee, and was a citizen, and devised, &c. but because he did not deny that he was not resiant in the city, or taxable to frut or lot, or inherited there by succession of descent, and is not in the same city, and so no citizen, and then out of the case of the custom, therefore it was awarded that the King have the land for mortmain.*

[8. But there it is agreed by Finchden, that *citizens born and inheriting in London, by way of heritage or resiants, and taxable to scot and lot, may devise in mortmain lands of which they are seised in fee.* But D. 8, 9 El. 255. 3. cited the 45 E. 3. to be that such devise cannot be made in mortmain, unless by a citizen or freeman; but the book is contrary. 38 Aff. 18. agreed.]

Br. Customs, pl. 7. cites S. C. and S. P. admitted, but nothing is cited there as said by Finchden,

and the word (demise) is mentioned in three several places in all the editions, instead of (devise) and which is the only word in the year book.—Br. Mortmain, pl. 35. cites 38 Aff. 18. and 43 E. 3. 26. and Brooke says, vide that none can devise in mortmain in London but he that is a citizen born, and inhabiting in London; quere inde, & Vide Librum London of their Customs; for Brooke says, that those books here do not know the truth, as he believes; for it was otherwise used in London after this, as it is said, but every owner may devise there to a layman, but none can give in mortmain there, for this is out of the custom, but may devise in mortmain.

[9. 30 H. 8. S. 132. Such testament ought to be *enrolled ad proximam huslings.*]

Br. London, pl. 20. cites 29 Aff. 31.

that such testaments are enrolled in London within the year; but Brooke makes a quere, if it be of necessity or not.—Br. Office devant, &c. pl. 19. cites S. C.—Br. London, pl. 31. cites F. N. B. 199. that such testaments shall be enrolled before the mayor in the huslings; but Brooke makes a quere, if it be of necessity, unless where the devise is in mortmain; for by several it need not otherwise to be enrolled.

[10. Doctor and Student 21. puts the devise in *mortmain* by testament enrolled, but none of the other books makes any mention thereof.]

[11. 5 H. 7. 19. b. per Brian, *this custom came by grant of the King.*]

Fitzh. Custom, pl. 8. cites S. C.

[12. Co. 8. 129. Case of the city of London, it is said, that in London, citizens and freemen, by their custom, *may devise in mortmain, notwithstanding the statute of mortmain* be to the contrary, *for the customs are confirmed by act of parliament.*]

The custom of London is, that a freeman may devise land to a corpora-

tion in London; and that a citizen may devise to any man; and that a citizen and freeman may devise in mortmain; per Fleetwood Recorder of London. Mo. 136. in pl. 280. Trin. 25 Eliz.

[13. D. 28, 29 H. 8. 33, 12. the custom of London is, that a man may *devise his purchased lands in mortmain.*]

[14. 12 El. D. 290. 61. admitted and adjudged, that a *recovery suffered by baron and feme, of the lands of the feme, is as strong to bind the right of the feme-covert by the custom of London, as a fine*

Jenk. 238. pl. 17. cites S. C.—A recovery in C. B. of

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land in *fine at Common law.* Vide such custom in Wales 21 El. D.
London is void. Jenk. 363. 26.]
181. pl. 2. cites 2 E. 4. 19. and 9 H. 7. 13.

*15. The wife of a merchant in London may sue and be sued by custom, because London being the chief place of trade and merchandise, it is intended, that merchants cannot be always resident there, but sometimes beyond sea, and in other places, about their affairs; and therefore it is reasonable, that the wife should sue and be sued in the absence of her husband; Arg. 2 Brownl. 218. cites 39 H. 6.

16. A feme covert shall sue an action alone, without her husband, for she is a sole merchant; also they do certify recognizances ore tenus; per Wray and per Gawdy, a feme covert may have an action within the city, but not here. Le. 131. pl. 178. Pasch. 31 Eliz. B. R. Chamberlain v. Thorp.

17. Citizens, who are to be discharged of *prisage* of wines, ought to be citizens, freemen, and commorant, not in a chamber, but to keep a settled house there; per Doderidge J. 3 Bulst. 16. Hill. 12 Jac. and Ibid. 23. per Coke Ch. J. S. P.

18. A free-woman of London is with the charter as to *prisage*; per Doderidge J. and Coke Ch. J. said, that so it is for *apprentice* in London. And that homo includes both sexes. And therefore the custom of London being, that if a freeman devise a legacy to an orphan, the executor must find surety to pay it, or be imprisoned; a legacy left by a free-woman is within the custom, Roll. Rep. 316. Hill. 13 Jac. B. R. Spencer's case.

Fol. 557.

(N) Customs of Things.

Cro. E. 409. [1. CO. 5. Snelling 82. admitted by judgment a good custom, pl. 21. Snelling v. Norton, S. C. & ought to pay the money dies intestate, his administrator shall be S. P. per bound to pay it, as well as if it were by obligation.] tot. Cur.—
Noy 53. S. C. accordingly.

2. Feme covert in London, sole merchant, shall have action here within her baron. Br. Customs, pl. 43. cites 1 E. 4. 5.

3. And debt against pledges lies in London without speciality. Ibid.

4. So where a man counts upon a concessit solvere by custom of London. Ibid.

See Feme
sole Mer-
chant at
Feme (B):
Dr. Caf-
toms. pl. 10.
cites S. C. &

(O) Customs of London,

[1. THERE is a custom in London, that when a chaplain keeps any woman in his chamber suspiciously, a man may
some

come to his chamber *with the beadle* of the ward, and *enter the chamber and search.* 2 H. 4. 12. b.] S. P. and fo of Consta- bles. Br.

Trefpals, pl. 74. cites S. C.

*[2. It is no good custom in London, that if any *person dies within any parish in London, and is carried out of the parish to be buried in any other parish*, if he is buried in the chancel or other- ways, *he shall pay so much to the parson of the parish where he died, as he should have paid if he had been buried there in the chancel or otherways*, as where he was buried; for this custom is against reason, that he that is not any parishioner, but passing through the parish lies at an inn for a night, should be forced to be buried there, or to pay as if he had been buried there. Hobert's Reports, 238. between Topfal and Ferrers.] Hob. 175. pl. 196. Topfall v. Ferrers, S. C. ad- judged.—Mod. 48. pl. 103. Twilfen Jo cites S. C. as a bad custom.

[3. The custom of London is godd, *that if a villein abides in London for a year and a day, that he shall not be taken nor put out by writ de nativo habendo, nor by any process thereupon* issuing. 7 H. 6. 32. dubitatur. 8 H. 6. 3. b. for this is not more than is in ancient demesn.] Cott. held that this is no good cus- tom; for London can not pre- scribe to

bied all the realm, but themselves only; but Godred contra. However the best opinion was, that the return and custom was good; for the abbot of C. prescribed in sanctuary to save thieves, and it was admitted that he well might, and therefore a fortiori may retain villain or nief. Br. Customs, pl. 23. cites 7 H. 6. 31, 32. and 8 H. 6. 3.—Br. London, pl. 6. cites S. C.—Mo. 2. pl. 4. Hill. 12 H. 8. the sheriffs of London's case, S. P. if no claim is made of him in that time. —Bendl. 2. pl. 2. S. C. and the pleadings.

[4. By the custom of London, *no attaint lies for a false ver- dict given in London.* 7 H. 6. 32. b.] Br. Cuf- tom, pl. 23. cites S. C.—

Br. London, pl. 6. cites S. C. says it was agreed that it was admitted that they have such custom, and that the custom was allowed.

[5. It is a good custom in London, *that the mayor of London may take recognizances of any person being of full age, or woman unmarried*, for he is a judge of record, and though perhaps the debt grew due out of London. Dubitatur, Tr. 32. El. B. R. be- tween Chamberlain and Thorp.] Cro. E. 186. pl. 11. S. C. the declara- tion was, that the mayor had used to take

recognizances by custom of all except infants and feme covert, unless upon such certain exc. p. 114 days, and that this recognizance was taken before the mayor there. It was moved in arrest of judgment, 1st. That the custom is unreasonable, viz. to take recognizances of all persons except feme covert and infants, and doth not except men non sane memorie; sed non allocatur; for such may acknowledge a recognizance and have no remedy to avoid them, and therefore they are excepted which may. 2dly. That it is not averred that the defendant was not an infant, &c. or that the day upon which it was taken was none of the excepted days; sed non allocatur; for it shall be intended if the contrary be not shewn by the defendant; and so the justices said the law is clearly taken at this day upon the statute of 1 R. 3. to plead a freestment by cessuy que use. 3dly. That none can take recognizances but justices of record which had authority by patent, &c. As the justices of the benches, and justices of the peace by commission, and the mayor is not a judge of record but by custom; sed non allocatur; for the custom is good, and the customs of London are confirmed by parliament, and are good though strange, and so it was adjudged in this court between Mabbie and Frying. 4thly. The custom extends as well to recognizances taken of strangers as citizens, or for matters within the city; and for this cause Gawdy held it was not good.

[6. It is a good custom of London, *that they, time out of mind, have used to have a measuring of coals infra portum London*, which extends from Stanes-bridge to London-bridge, and from thence

to Gravefend, and from thence to Yenland, or Yendale, and all this is the port of London. Mich. 11 Ja. B. between the city of London and Manly. Per Curiam.]

[243] 7. London prescribed, *that their guilds and fraternities might make other guilds and fraternities by usage*; but judgment was given against them, for none can do it but by charter of the King, making exprefs mention thereof; and where they prescribed to make laws and statutes; Belk. said, *they cannot alter the estate and inheritance*, as to make land descendable to the eldest son, to be departable between the males; for the King cannot do this by grant without an act of parliament, nor make tenements devisable by this charter, quod Candiſh conceſſit. Br. London, pl. 22. cites 49 Aff. 8.

8. Custom of London *to examine causes by the mayor, at the suggestion of the plaintiff or defendant, pending a plaint before the sheriff of London*, and upon examination and ſatisfaction found to bar the plaintiff, it is a good custom; contra if it be prescribed after judgment given; for it is not reasonable to avoid a judgment by examination. Br. Customs, pl. 60. cites 10 H. 6. 14.

9. By the custom of London, *lands and houses there might be bought and sold by word only*, without any deed or enrollment; and this is a good custom notwithstanding the statute 27 H. 8. of inrollments; by the opinion of the justices of both benches. D. 229. a. pl. 50. Pasch. 6 Eliz. Chibborn's case.

10. There is a custom in London, *that apothecaries who sell unwholesome drugs, shall forfeit a certain penalty*; debt was brought in London by the chamberlain against W. for this penalty. Upon a habeas corpus & cauſam brought by W. the court awarded a procedendo, becauſe the plea in London is maintainable by the by laws and customs there. Mo. 403. pl. 538. Pasch. 37 Eliz. Wilford v. Maſham.

Ibid. cites S. P. as ruled accordingly, Pasch. 21 Eliz. in MARR'S CASE, and that it was ruled accordingly in one Taylor's case, and in error brought before Manwood, and other ſpecial commiſſioners for this pur-

11. Error of a judgment in C. B. by confeſſion in an action of debt, brought by the ſucceſſor of the late chamberlain of London; the error aſſigned was, That the action was brought by the defendant in error, as ſucceſſor of B. chamberlain of London, *upon a bond made to him ſolvendum to him and his ſucceſſors*, and alleged the custom of London, *that the chamberlain there had uſed time out of mind, &c. to take bonds payable to him and his ſucceſſors, that their ſucceſſors ſhall ſue thoſe bonds in any court*, and that all their customs were confirmed by parliament 7 R. 2. and that the plaintiff had judgment upon this bond; whereas by law a bond, being but a chattle, cannot go to a ſucceſſor, but in regard it is alleged to be a corporation for that purpoſe, the Court held the custom to be lawful and reaſonable, and ſhall go to the ſucceſſor and not to the executor, and affirmed the judgment. Cro. E. 464. (bis) pl. 16. Pasch. 38 Eliz. B. R. Bird v. Wilſon.

poſe, the judgment was affirmed.——And in a note ibid. at the end of the caſes, cites 43 & 44 Eliz. B. R. WILFORD v. HUTTON, where debt was brought on ſuch a recognizance made to B. his predeceſſor alleging the custom of London, for the chamberlain to take obligations or recognizances to them and their ſucceſſors for orphans portions; and after judgment for the plaintiff, error was brought thereof in the Exchequer Chamber, where the judgment was affirmed.

12. Custom, that if any free-man devised any legacy to an orphan, that the executor should be constrained to find sureties to pay the legacy according to the law; in this case regard ought to be had to assets, and conditions, and the will of the party; per Cur. Roll. R. 316. pl. 27. Hill. 13 Jac. B. R. Spencer's case.

13. A custom for the mayor of London to appoint a place for taverns, &c. and to imprison for erecting one in a place against their wills, is good. Mar. 15. pl. 34. Pasch. 15 Car. Anon.

14. By the custom of London, a tenant at will under 40s. rent, shall not be turned out without a quarter's warning, and if the rent be above 40s. he must have half a year's warning. 2 Sid. 20. Mich. 1657. B. R. Dethick v. Sanders.

15. On a certiorari, the return was of a custom for the company of merchant-tailors to choose livery-men, and to commit the refusers, and that was elected, without reasonable cause, refused, and therefore they committed him; it was objected, that the custom to commit, is not good, because it does not concern the government of the city, but the state of a company only. 2dly, It does not appear, that he was habilis & idoneus, and therefore not eligible; sed non allocatur; for as to the 1st, *all the customs are confirmed by statute; and as to the 2d, the refusal without reasonable cause, implies habilis & idoneus. 2 Lev. 200. Trin. 29 Car. 2. B. R. The King v. Merchant-Tailors.

[244] So upon a habeas corpus to the keeper of Newgate, he returned, that in London there are companies, some freemen of which companies are livery-men,

and that there is a Court of Aldermen, and that if any person duly chosen does not take upon him the office of a livery-man, he may, by custom, be committed by the Court of Aldermen, to any officer of the city; and that Clerke being before that Court, and refusing, the Court committed him by warrant in writing to the keeper of Newgate, until he should declare his consent to take upon him that office. Resolved, that B. R. takes notice of a livery-man, and of the nature of his office, and that he who comes into a company agrees to incident charges and duties; and it was admitted, that a corporation might have a power to commit by custom, though not by a charter or by law, and that the Sheriff is the proper officer, to whom they should commit him. 1 Salk. 349. pl. 5. Hill. 3 W. 3. B. R. King v. Clerke.

16. Upon a habeas corpus and certiorari the return was a custom, &c. that if any freeman of the city speaks contemptuous words of an alderman, that in such case, the common serjeant has usually exhibited an information against him before the mayor and court of aldermen, and that if the offender be convicted by verdict or confession, they used to punish him by fine or disfranchisement; that Clerke spoke scandalous words of Alderman Lawrence, when he was surveying the measures of coals, (viz.) that he would undo the city, and that he was a knave; it was objected, that a custom to try a man for words spoken of an alderman, &c. in the Court of Aldermen, is unreasonable, because he is both judge and party, besides it does not appear, that Clerke is a freeman; though in the information, which is returned in hæc verba he is said to be a free-man; but that is not sufficient, for it ought to be returned in fact, that he is a free-man. The Court would not grant a procedendo without further argument, for they said it might be dangerous to put it in the power of the aldermen to disfranchise a free-man for speaking words of an alderman. 2 Lev. 200, 201. Trin. 29 Car. 2. B. R. The King v. City of London.

Vent. 387. Clerk's case, S. C. the Court said, that they might fine in such case, but the other custom would not hold, notwithstanding the act of confirmation of their customs, which does not extend to unreasonable customs.—3 Keb. 811. pl. 27. The City of London v. Clerk, S. C. cited

the Court held, a custom to disfranchise for words is void, and a procedendo was denied.—S. C. cited

cited 2 Salk. 426. Trin. 1 Ann. B. R. per Cur. and they held accordingly.——S. C. cited 2 Ld. Raym. Rep. 777. and agreed by Court and counsel of both sides, that a custom to disfranchise for such words would be void. But M. Dec said, that notwithstanding the report in Levinz, he had seen a rule for a procedendo in the said case.

a Roll. Rep. 17. By the custom of London any person above fourteen and 305. Patch. under twenty-one unmarried may bind himself apprentice, &c. according to the custom, and the master thereupon shall have tale remedium against him, as if he were twenty-one. In covenant brought on an indenture of such an apprentice, the Court held the custom sufficiently alleged to give and make good an action of covenant, that tale remedium implies it, and well as other things; and though by common law or the statute his covenant shall not bind him, yet by custom it shall. Mod. 271. pl. 22. Trin. 29 Car. 2. B. R. Horn v. Chandler.

the indenture is not inrolled within the year before the chamberlain; but that is with this difference, that the apprentice may come in before the mayor and aldermen, and there shew his matter in petition in French, that the deed is not inrolled within the year, and thereupon a scire facias shall issue to the master, to know why the deed was not inrolled, and if upon his default the deed was not inrolled, the apprentice may sue out his indenture, and shall be discharged; but if the not doing it was by the default of the apprentice, as if he will not come before the chamberlain, but absents himself, he shall not be discharged; for the deed cannot be inrolled unless the infant is present in court and acknowledges it.

[245]*

3 Keb. 764. 18. Upon a habeas corpus to the mayor, &c. of London, a custom was returned to disfranchise, and commit a free-man for speaking opprobrious words of an alderman. The Court said they might fine in such case, but the other custom would not hold notwithstanding the act of * confirmation of their customs, which does not extend to unreasonable customs. Vent. 327. Hill. 29 & 30 Car. 2. Br. R. Clark's case.

by the recorder, to which the counsel for the defendant agreed; but per Cur. this is an unreasonable custom to disfranchise for speaking words, being against Magna Charta, and by Wild J. such an act of parliament would be unreasonable, and a procedendo was denied by the Court. Ibid. 811. pl. 27. S. C. and on a further motion the Court held a custom to disfranchise for words to be void, and a procedendo was denied.

19. In trespass for taking and breaking so many dozen of spectacles, &c. the defendant pleads that the city of London is an ancient city, that therein is and hath been an ancient custom, that if any make and expose to sale ill and unserviceable goods, the chief officers of the company have used to seize them, and carry them to the Guildhall, and impanel a jury, and if they find them ill and unserviceable, to break them, and shew that the plaintiff is one of the company of spectacle-makers, and that the defendants are master traders, and chief officers of the company; and that the goods made by the plaintiff, and taken ut supra, were unserviceable; the Court took the custom to be good and reasonable, and the judgment was for the defendant nisi. Skin. 55, 56. pl. 8. Trin. 34 Car. 2. B. R. Bolton v. Throgmorton.

20. By custom in the city of London the lord-mayor is chancellor, and may call causes before him out of the Sheriff's Court, and rule them according to equity. Skin. 67. pl. 13. Mich. 34 Car. 2. B. R. in case of Barns v. Barns.

21. Custom

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21. Custom of the city of *London* shall be preferred to the custom of the province of *York*, and notwithstanding the custom of the province of *York*, the heir by the custom of *London* shall come in for a share of the personal estate, for the custom of the province of *York* is only *local*, and circumscribed to a certain place, but that of *London* follows the person though never so remote from the city. 2 Vern. R. 82. pl. 78. Mich. 1688. *Cholmley v. Cholmley*.

a Vern. 47.
S. C. referred to a master to state the matter specially.

22. Upon a certiorari the custom of *London* was returned, to punish by information in the Court of Aldermen, either for an assault or contemptuous words spoken of an alderman in the execution of his office, and to fine him; and that at a wardmote held by Sir Robert Jeffries, the defendant assaulted him, and said, I have as much to do here as you; you think sure you are amongst your bride-well-birds, but you are mistaken; the Court held that it had been doubtful, if the offence had been by words only, because no indictment lay at common-law, but he is to be bound to good behaviour; yet for assault he is punishable, and that may be by information there by the custom, as well as in B. R. by the course of the court, though the regular course by the common law is indictment. Secondly, The Court held, that the information lay in the Court of Aldermen, though an alderman was grieved; otherwise of the mayor, for he is an integral part, without which the Court cannot be held, but the other may be severed and he must not sit. 3 Salk. 426. pl. 2. Trin. 1 Ann. B. R. the Queen v. Rogers.

7 Mod. 28.
S. C. and as to the assault the Court awarded a procedendo; for they may have a custom to punish by information such as assault the magistrate. — 2 Ld. Raym. Rep. 777. S. C. resolved accordingly, and a procedendo was granted.

(P) Pleadings of the Custom of London. [246]

1. **N**OTA, that it was agreed for law, that in debt in *London*, upon a concessit solvere, by the custom, the count shall be, quod pro merchandisiis sibi prius venditis concessit solvere &c. So that the merchandise ought to be rehearsed, and yet the merchandise is not traversable, as it seems. Br. London, pl. 15. cites 38 H. 6. 29.

2. Where the custom of *London* is in issue at Westminster, or elsewhere, if the party will have it to be tried by certificate of the city, he ought to surmise, that the city is an ancient city, and that there has been a custom time out of mind, that where their custom is in trial in any courts of the King, that it shall be certified by the mayor and aldermen, by the mouth of their recorder now held; for if he does not make such surmise, it shall be tried by the country, as other matters in fact are. Br. Trials; pl. 96. cites 5 E. 4. 30.

3. In a writ of entry sur disseisin brought in C. B. the defendant pleaded, that the house in demand is within the city of *London*; and that the said city is antiqua civitas; and that King Hen. 3. concessit civibus civitatis prædictæ, quod non implacitentur de terris & tenementis suis, &c. extra muros civitatis prædictæ. and further

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said; *that he himself is civis London, &c.* and demanded judgment of the writ; (note, in the pleading before, the tenant said) *Et illis rectum teneatur intra civitatem prædictam secundum consuetudinem civitatis prædictæ.* And to this plea, exception was taken, because that the tenant doth *not shew before whom, by their custom, they ought to be impleaded.* It was the opinion of the whole Court, that the tenant *ought to have shewed, that the citizens for their lands ought to be impleaded in the hustings, &c.* And the general words in the plea, viz. *Sed illis rectum teneatur intra civitatem prædictam secundum consuetudinem civitatis prædictæ.* did not supply the defect aforesaid. After, it was awarded by the Court, that the tenant answer further, &c. 3 Le. 148. pl. 197. Hill. 28 Eliz. C. B. Anon.

4. The customs of London are only triable by the mayor and aldermen, by the mouth of the recorder, if it be not a matter in which the corporation of London is a party. The customs of other corporations are triable by the country, if they be denied. Jenk. 21, 22. in pl. 40.

5. The judges of every place are supposed to have knowledge of the laws of the place whereby they do judge, and to have customaries among them; and therefore, in suits of their own courts, do determine them, as the judges of the common law do in the King's courts judge the general customs of the whole kingdom being the common law; and so in London, by special privilege, they certify also their customs of this nature into B. R. which other towns do not. *And their customs, even those that are their local laws, are triable by jury, if they come to issue in the King's courts.* And agreeing with this was found and shewed a precedent, Mich. 37. 38 Eliz. Rot. 418. in C. B. London, BILFORD v. LOWE, in an action upon the case for certain parcels of plate, and the issue was, *whether the custom of London was, that there was a common market in London, for all goods in all open shops, all days, except Sundays and holy days, from the sun rising to the sun set; and concluded, Et hoc parati sunt verificare, ubi & quando ac prout Curia consideraverit.* And then the defendants made their surmise for the trial of their custom by the mouth of their recorder, and [247] prayed a writ accordingly; and it was granted returnable in Trinity Term, and continued per non misit breve till Octabis Mich. and then it is entered, that the conclusion of the defendant's plea ought to have been, *Et de hoc ponit se super patriam; whereupon the plea was so made, and issue taken, and upon venire facias to the sheriff of London, found for the plaintiff, and had judgment; per Hobart Ch. J. Hob. 87. in case of Day v. Savadge.*

6. In laying the custom of London as to taking apprentices, he must declare, that he is civis, as well as liber homo. 2 Bulst. 193. Hill. 11 Jac. Burton v. Palmer.

For more of Customs of London in General, See
other Proper Titles.

Damages.

Damages.



This in Roll
begins with
Letter (O)

Fol. 569.

(A) *Who shall recover Damages.*

- [1. **T**HE *heir* in a plea of land, shall not recover damages for *damages in the time of his ancestors.* 17 E. 3. 45. b.] Fitzh. Damages, pl. 85. citra
S. C. & S. P. per Stone.—*Entry sur dissein* made to the father of the demandant, and passed for the plaintiff, and it was awarded, that he should not recover damages; for the *statute of Gloucester*, which wills, that the demandant recover damages, against any who is found tenant after the disseisin, is intended the disseisee himself, and not for the heir of the disseisee, quod nota, by award. Br. Damages, pl. 20. citra 48 E. 3. 7.
In a writ of Ayel, A. was awarded to the Sheriff to inquire of damages, and he inquired of the damages in the life of the father of the demandant, and well per tot. Cur; the reason seems to be inasmuch as the demandant is heir immediate to the grandfather now, contra it seems if he makes himself heir to the father, as in moridanceffor. Br. Damages, pl. 37. citra 2 H. 4. 13.

- [2. The *executor* shall not recover damages in debt, for *damages in the time of the testator.* 17 E. 3. 45. b.] Fitzh. Damages, pl. 85. citra
S. C. & S. P. but for damages after the testator's death he shall.

- [3. The *successor* shall recover damages in debt, upon an obligation for damages in the time of the successor. 17 E. 3. 45. b.] Fitzh. Damages, pl. 85. citra
S. C. that the successor shall recover damages for the whole time [which seems to intend the time of the predecessor and successor.]

- [4. The *master of Saint-Cross*, who is *presentative* as a parson, shall not recover damages in a writ of *annuity* for the time of his predecessor. 26 Aff. 4.] Br. Garden &c. pl. 5. citra S. C. —Br. Damages, pl. 108. citra S. C. and so the damages were severed.

- [5. *But otherwise it would have been, if he had been elective,* for there he should have recovered damages for the time of his predecessor. 26 Aff. 4.] [248]
Br. Garden &c. pl. 5. citra S. C. Brooke says, quod nota a good diversity between such like incorporations.—Br. Damages, pl. 108. citra S. C. and says nota diversitate.

6. In debt upon an obligation by the King, he recovered, and the servants of the King dared not take judgment of damages, but of the principal only, and yet the Prothonotaries shewed diverse precedents that the King had recovered damages. Br. Damages, pl. 15. citra 34 H. 6. 3.

7. And it was agreed there, that the King shall not recover damages in quare impedit for lapse nor disturbance. Ibid.

Damages.

8. *Presentee of the King to a corody*, made his plaint, that the abbot would not admit him to the corody according to the prayer of the King; and the abbot returned cause; and by all the justices the King shall not recover damages in this case, but the presentee; for the damage is to him; for the King has only the presentation. Br. Damages, pl. 93. cites 39 H. 6. 49.

(A. 2) Recovered How. Not without Writ.

1. **W**HERE a man would recover damages, he ought to take new original; and it is not a writ judicial. Br. Damages, pl. 36. cites 50 E. 3. 23.

2. A man cannot recover damages without original. Br. Damages, pl. 50. cites 11 H. 4. 10. by the reporter.

This in Roll. is (P) though it is the second letter there:

(B) Who shall recover damages in an Action, in respect of his estate.

* This should be pl. 35. Ld. Cromwell v. Andrews.

[1. **I**F lessee for years be ousted, and he in the reversion disseised, and he in the reversion recovers in an assise, yet he shall not recover damages. D. 19 El. 354. * pl. 15. † 15 H. 7. 4. b. 5 H. 7. 10. b. Co. 9. 105. b. 3 H. 6. 33. Contra, 12 H. 6. 4.]

† Br. Damages, pl. 81. cites S. C. and by Brian the reason is, that the damages are to the tenant only. — Br. Assise, pl. 83. cites S. C. & S. P. and for the same reason by Brian J. Quod non negatur. — 2 Inst. 285. S. P. that he shall recover no damages for the profits of the lands; because they did not belong to him.

[2. So if after the ouster, he in the reversion enters upon the disseisor (as he may by the law to save a discent) and after the disseisor re-enters upon him, and he recovers in an assise; yet he shall not have any damages, for the re-entry of him in reversion reduces the estate to the lessee, and then the damages, instead of the profits, belong to him, and then he shall not be twice charged. Quære, D. 19 Eliz. 355. 15 H. 7. 5.]

[249] 3. Tenant for life and he in the reversion join in a lease for life; it is said, that they shall join in an action of waste, and that the lessee for life shall recover the place wasted, and be in reversion, damages. Co. Litt. 42. a.

This in Roll. is (Q)

(C) Damages against the Defendant. How to be given. In what Cases they shall be joint.

[In respect of several Matters contained in the Declaration against the same Defendant.]

Cra. C. 414. pl. 1. King & Fitch. Mich. 11 Car. 3. C.

[1. **I**N an action of waste, if waste be assigned in domibus, scilicet, in three messuages, and in gardens, scilicet, in cutting down six apple-trees, and ten pear-trees in one garden, and ten pear-trees, and

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*from apple-trees in another garden, sparsum crescent, shewing the value of every particular; and upon the default of the defendant, a writ of enquiry of waste was awarded, and the jury finds the waste in the three messuages, and in some of the apples and pear-trees to his damage 50l. This is a good verdict, though the damages are assessed entirely, though it was objected, that the damage of the apple and pear-trees might be so small, that the place * wasted should not be recovered; but they being alleged also to have been sparsum crescent' throughout the garden, shall be recovered. But if it was so small, yet, all being upon one demise, if all the waste be of a considerable value, though the particulars are but small, yet the place wasted shall be recovered. Mich. 11 Car. B. R. between Fitch and King, adjudged per Curiam, as to this point, upon a writ of error, upon a judgment in banco. Intratur, Trin. 9 Car. 213.]*

& S. P. held accordingly; for when the sheriff and jury have had the

* Fol. 570.

view, and given damages for the waste, it shall not be intended petit damages in any; and the usual

course is, in all cases, to find intire damages.

2. *Trespass of a close broken, and emblements taken, it was found by matter in law, that the plaintiff ought to recover for the close broken, but not for the corn, to the damage of 40s. and they were compelled to sever the damages, and so they did, 20s. for the one, and 20s. for the other; for, for part the plaintiff ought to recover, and for the rest not. Br. Damages, pl. 169. cites 42 E. 3. 25.*

3. *Where tenant for life to the aunt, and the niece does waste in their time, and had done waste before, in time of the two sisters, the aunt and the niece shall join in waste, and the damages shall be severed, quod nota. Br. Damages, pl. 31. cites 45 E. 3. 3.*

4. *Quare imp. against baron and feme in jure uxoris, the plaintiff recovered, and levied the damages upon the baron, and the baron died, the feme brought attaint, and assigned the false oath in the principal, and good by judgment, and attaint was brought against him who first recovered, and against another who pleaded non tenure, and it was found against him, and the false oath found in the other points also, and the plaintiff was restored to her first damages lost. And the judgment was of this against him who first recovered only, and not against both the defendants. But the judgment of damages in the attaint was against both, so the damages severed in judgment. Br. Damages, pl. 162. cites 46 Ass. 8.*

5. *Præmunire against two, one was found guilty as principal, [250] and the other as accessory, and damages severed, and the plaintiff prayed judgment against them in common, and had it, notwithstanding that Hales said, there may be principal and accessory, in præmunire, and this, because it was found, that the two were coadjutors, procurers, and abettors to the third, to sue the bull. Br. Damages, pl. 46. cites 8 H. 4. 6.*

So præmunire against 3, one as procurator, another as counsellor, and the third as attorney, who

were found guilty, and the damages were severed, *quare causam*, whether because they are several torts, or because they are principal and accessory, as in felony. Br. Damages, pl. 197. cites 36 H. 6. 32.

6. *In assise by baron and feme of disseisin and goods carried away, the plaintiffs recovered the land and damages of issues in common, and*

and the baron alone damages for his goods. Br. Judgment, pl. 20. cites 11 H. 4. 16.

7. In appeal against several who are acquitted, every one of them shall recover damages against the plaintiff severally, and not jointly; contrary of the plaintiffs. Br. Judgment, pl. 93. cites 11 H. 4. 16.

8. Where a man has two daughters and dies seized, and N. abates, and the one daughter has issue and dies, the issue and the other shall have *marriage*, and the other shall recover damages for her own time, and she, and the issue shall recover damages in common for the time after the death of the mother. Br. Damages, pl. 51. cites 11 H. 4. 16.

9. *So in waste*, where the daughter has issue and dies, the other and the niece shall join and recover damages as above, quod Hank. concessit; for they cannot do otherwise than to join, and cannot otherwise recover their damages; for an entry upon the abator determines the damages, but in disseisin of land, and taking of goods, trespass lies of the goods. Ibid.

Br. Privilege, pl. 19. cites S. C.

10. If two do to me a trespass, and I after have several actions against them, and recover the entire damages against each, and have execution, the one cannot plead that the plaintiff has recovered against the other for the same trespass, his damages, and had execution; for it is no plea. Br. Judgment, pl. 98. cites 14 H. 4. 22.

11. *Contra*, where the plaintiff joins them in action, there he shall have only damages against both, and if they join themselves in action, he cannot sever them in action after, as after nonsuit, discontinuance, &c. Per Hank. quod fuit concessum arguendo. Br. Judgment, pl. 98. cites 14 H. 4. 22.

Br. Verdict, pl. 2. cites S. C.

12. Detinue of diverse goods, and counted the value and price of every thing certain by itself, and the inquest gave a verdict quod detinet ad damnum 10l. in gross; and by the opinion of the Court they ought to sever the damages of every thing by itself; for the plaintiff shall recover the thing, and if the thing be lost then the value thereof, which cannot appear if the damages are not severed, quod nota. Br. Detinue de Biens, pl. 4. cites 3 H. 6. 43.

13. Forcible entry was found for the plaintiff to the damage of 10l. and costs 5l. Per Straunge, if the damages be not severed in every action where a man shall recover damages, the justices ought not to give judgment, and if they do, it is an error, which was denied, per tot. Cur. Brook says it seems that his intent is, that the damages shall be severed from the costs. Br. Damages, pl. 88. cites 14 H. 6. 13.

14. In trespass in a park and seven acres adjoining, the jury ought to sever the damages, quod nota. Br. Trespas, pl. 145. cites 21 H. 6. 33. and 22 H. 6. 7.

15. Damages may well be severed, but costs are intire, and cannot be severed; per Prisot. Br. Damages, pl. 89. cites 36 H. 6. 13.

16. Damages cannot be severed in trespass. Br. Damages, pl. 78. cites 15 E. 4. 25.

[251]

17. Trespas of goods taken, they were at issue upon the property and found for the plaintiff to the damage and costs of 6l. and the defendant

defendant prayed that the damages should be severed from the costs, and per Brian, Chocke, and Littleton, it is *at the election of the plaintiff* if he will have them severed, or in gross; by which they were not severed. Br. Damages, pl. 128. cites 18 E. 4. 23.

18. *Trespas against four*, the one pleaded that *de son assault demesne*, &c. and the others pleaded not guilty; there per Cur. if the plea of the first be found against him he shall render the entire damages; for the trespass is confessed by his plea, unless he says that the plaintiff made the assault, but of the other, it shall be inquired, if they did the trespass, and how they did it, and if it be found that the three made the assault, but did not maim the plaintiff, then the judgment of the damages shall be for the assault against all in common; and of the maim, against him who justified. Br. Damages, pl. 168. cites 6 H. 7. 1, 2.

19. *Rescous*; the plaintiff counted, that the defendant held of him by homage, fealty, and 10s. rent due at Easter and Michaelmas, and for the rent he distrained, and the defendant made rescous where it appeared in the declaration, that the one feast was past and the other not, and the defendant pleaded not guilty, and the jury found that there was no such tenure, but that the plaintiff leased to the defendant at will, rendering 10s. at those feasts, and that this was arrear and the plaintiff distrained, and the defendant made rescous, and per Brian the plaintiff shall not recover; for the damages ought to have been severed here, and they are assessed in common for the day past and the day to come. Br. Verdict, pl. 56. cites 9 H. 7. 3.

20. *Trespas against two of trees cut*, the one justified for himself of common there, and the other for common there for himself, and they are found guilty and damages taxed intirely, and by the best opinion it is well, for it is only one and the same trespass, though the answers are several. Br. Damages, pl. 202. cites 11 H. 7. 19. 20.

21. *Contra* in trespass against two, of two horses taken; for this is a several trespass. Ibid.

22. If trespass be brought against two, the damages ought not to be severed, if they be not found guilty at several times. But if so, several damages and entire costs shall be given. Jenk. 269. pl. 86.

23. *Trespas against three*, they plead several pleas, and several issues are joined, and all tried by one jury; and entire damages and not several given, judged good, and affirmed in error, for they are all found guilty, as the plaintiff has declared, and that was jointly against them, and of a joint trespass. Jenk. 317. pl. 10.

24. *Trespas of battery and wounding against two*; one pleads to all, except the wounding, that it was in his own defence, and to the wounding, not guilty. The other justifies all in his own defence. Issue was upon both pleas. The jury found the first guilty of the wounding, and also of the battery, and assessed damages 20l. and finds the issue against the other, and damages 100l. and gave entire costs against both, and judgment was accordingly. Error was brought and assigned, that there ought to have been but one judgment for damages, and he ought to have made his election against whom he would take his judgment; and the Court was of the same opinion; for

for this action is for one joint trespass, and therefore one joint damage ought to have been given against both, though they severed in pleading, they being both found guilty of the same battery; and therefore the judgment was reversed. Cro. J. 118. pl. 7. Pasch. 4 Jac. in B. R. *Crane v. Humberstone*.

[252] 25. Battery brought against three, two of them pleaded not guilty, and judgment by non sum informat against the third, and the two were found guilty for all; and the jury gave damages severally, against one 100l. and against the other 100s. It was resolved that the damages that were given by the first jury, to wit, 100l. shall be recovered against all the defendants in that writ named; and that in trespass the first jury taxes the damages for the whole trespass, that shall bind all the defendants, and therefore execution was given against all the defendants for the 100l. Brownl. 233. Mich. 8 Jac. *Heydon v. Styles*.

This in
Roll is
letter (R)

(D) How to be given. In what Cases they may be joint.

Roll. Rep.
428. pl. 14.
S. C. ad-
judged, and
so is the
court of
the court, to
give joint
damages at
the election

[1. IF an action upon the case be brought upon two promises, and both are found for the plaintiff, the jury may give intire damages for both, for this is at the peril of the plaintiff; for if the action does not lie for either of them, the plaintiff shall not have judgment for the other; but it is not any inconvenience of the other part, if the action lies for both. Mich. 14 Jac. B. R. *Payne and Selby*, adjudged.]

of the jury, quod fuit concessum per Cur. and the clerks; and Doderidge said, that so it is where the action is brought for two trespasses, or the like, where both causes of action are of the same nature, — 3 Bulst. 258. S. C. says, that judgment was given for the plaintiff upon a demurrer, and upon a writ of inquiry the jury gave intire damages; Doderidge J. said, that the things joined are of one and the same nature, and therefore damages ought to be given jointly; but in a declaration for several things, there to set down several sums; and the whole Court agreed thereto, and judgment for the plaintiff.

[2. The law is the same in a trover and conversion for several matters, and issue taken severally, yet the damages may be joint.]

3. In an action of assault and battery against four for two trespasses, supposed to be done at two several days, if one defendant pleads not guilty to both trespasses, and another defendant pleads not guilty to the first trespass, and justifies the second trespass of the plaintiff's own assault, and the other two defendants plead not guilty to the first trespass, and judgment is given against them by non sum informatus for the second trespass, and upon these several pleas, several issues being joined, all are found for the plaintiff; though there are two several trespasses, and divers several pleas, yet the jury may assess one intire damage against all, and for both trespasses; but it is at the peril of the plaintiff, if he have no cause of action for any part of his damages being intire. Mich. 9 Car. B. R. between Eastcot & alios against Edwards, adjudged in a writ of error, and the judgment in banco affirmed accordingly. Intratur, Pasch. 9 Car. Rot. ultimo.]

[4. In

Damages.

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14. In a *decies tantum* against several, if they are attainted, the damages shall be given against them severally, and not jointly, for there were several takings. 44 E. 3. 36. b.] Br. Decies tantum, pl. 8 [7.] cites S. C. and it was against one for taking 10s. and against another for taking 6s. 8d. and the third a coat, price 3s. 4d. ad damnum 10 marks, and they were thereof attainted, but because the plaintiff had not severed the damages, the Court were of opinion to take the inquest de novo, whereupon the plaintiff released the damages.——Br. Damages, pl. 30. cites S. C.——Ibid. pl. 91. cites 35 H. 5. [6.] 28. S. P.

[5. In debt upon one obligation against two by several *precipes*, [253] the damages against them shall be several, according to the writ, scilicet, that the plaintiff shall recover all the damages assessed against each. 14 H. 4. 19. b.] Br. Damages, pl. 71. cites S. C. the plaintiff shall have several judgments, and damages severally, viz. against each of them the sum found by the jury, and the Court shall increase the damages beyond the verdict to a mark; quod nota; but it is said elsewhere, that he shall have but one execution.——Br. Dette, pl. 21. cites S. C. Fitzh. Damage, pl. 60. cites S. C.——Br. Several Precipe, pl. 8. cites S. C. and 5 E. 4. 4.——Br. Execution, pl. 40. cites S. C.

[6. In trespass for a battery, and carrying away his goods, upon not guilty pleaded, if one be found guilty only of the battery, and the other of carrying away the goods, the damages shall be given severally, and not in common. Contra, 22 E. 3. 20. b. adjudged.] Fitzh. Judgments, pl. 183. cites S. C. & S. P. admitted, where the battery and the carrying away the goods were done at several days, but where they are done at one and the same time, the judgment and damage shall be in common, and so it was done in this case.

7. *Affise* against several; one alleged jointenancy by deed with a stranger, who upon process did not come, by which the affise was awarded, where the other had pleaded misnomer of the plaintiff, and all found for the plaintiff; and against him, who pleaded jointenancy, double damages were awarded, and single damages against the other; and the double damages shall be levied of him who pleaded jointenancy only, and the other damages shall be levied of him and the other in common. Br. Damages, pl. 104. cites 22 Aff. 1.

8. In appeal against two they shall recover damages severally; per Hank. and per Westbery, if three join-tenants are, and one releases to one of the [other] two, and they are disseised, there the damages recovered shall be severed for the third part. Br. Damages, pl. 51. cites 11 H. 4. * 16.

* It should be 17. a. pl. 38.

9. Debt against two upon an obligation by several *precipes*, who pleaded *non est factum*, and the damages were severed, and the plaintiff had judgment against every one of them of the several damages; for the judgment ought to accord with the writ, and so it did, but there shall be only one execution, and shall not have execution against both. Br. Several Precips, pl. 8. cites 14 H. 4. 19. and 5 E. 4. 4.

10. Trespass of trampling his grass in the park of C. and in seven acres adjoining, and found for the plaintiff to the damage of 40d. and costs 20s. there it is good to sever the damages, and so they did, viz. 20d. for the one and 20d. for the other, where the

the defendant had justified for default of fence and hedge of the plaintiff. Br. Damages, pl. 72. cites 21 H. 6. 33. and 22 H. 6. 7.

11. *Trespass of a villein taken into his service from another, &c.* the defendant said that the villein was frank, and of frank estate, and the other e contra, and to the being in his service said, that he was not retained, and to the frank e contra, and found that he was villein to the plaintiff but was retained, and gave damages to 30l. and at the prayer of the plaintiff they severed them, and gave 28l. for the price of the villein, and 40s. for the loss of the service, and after the plaintiff released the demands of the service, and had judgment for the residue. Br. Damages, pl. 76. cites 22 H. 6. 30.

12. *Maintenance against two; the one justified as attorney for certain counsel, and gave 40d. and the plaintiff said, that he gave 6s. of his proper money to a juror in this action, and the other pleaded not guilty, and all found for the plaintiff to the damage of 10l.* This is no good verdict, for they ought to have severed the damages; for it appears several torts. Br. Damages, pl. 91. cites 36 H. 5. [6.] 28.

[254]
S. P. Br.
Damages,
pl. 101. cites
17 Aff. 22.
S. P.

13. *So in trespass against two, the one is found guilty of part and acquitted of the rest, and the other found guilty of the rest, and acquitted of the first part, the damages shall be severed.* Br. Damages, pl. 91. cites 36 H. 5. [6.] 28.

Br. Verdict,
pl. 97. cites
S. C.

14. *Detinue of certain rings of gold with precious stones, viz. a rubie and a diamond, and of twelve pieces of violet coloured cloth, and 10l. in money, in a bag sealed, and counted of several damages for each thing by itself, except the money, and the jury found damages of 30l. for all, except the money, and if the stuff cannot be rendered, then 20l. for the stuff, and 10l. for the money; and the best opinion was that the damages shall be severed for each ring and piece of cloth by itself. But see in Mich. 1 R. 3. fo. 1. that it is admitted that [where] the declaration was to a sum in gross, and the plea non detinet, and the jury gave damages in gross in like manner, and therefore judgment was given for the plaintiff against the opinion of several, quære if it shall not be error.* Br. Damages, pl. 141. cites 1 E. 5. 5.

Br. Verdict,
pl. 97. cites
S. C.

15. *And, by the best opinion, in quare imp. and writ of darrein presentment, the jury shall say, whether the church be full for six months or not, by reason of the damages of half a year in the one case, and of damages to the value of the church for two years in the other case, by the statute.* Ibid.

Br. Verdict,
pl. 97. cites
S. C.

16. *And in writ of ravishment of ward, the jury shall give damages to 100l. if the heir be married, and if not 20l. or such like.* Ibid.

S. C. cited
Arg. Mo.
149. — 10
Rep. 130.
cites S. C.

17. *In rescous, the plaintiff counted that the defendant held of him by fealty, and 10s. payable at Michaelmas and Easter, and for the rent arrear the plaintiff distrained, and the defendant made rescous ad damnum, &c. and the defendant pleaded not guilty. It appeared by the declaration, that the one day of payment was past and the other not, and the damages are not severed, and so the plaintiff cannot recover, by the best opinion; but per Brian the action*

action lies for part, and for part not, quære inde; for nothing shall be recovered in this action by damages which are intire, as here. Br. Rescous, pl. 28. cites 9. H. 7. 3.

18. Error on a judgment in *assise*, where the plaintiff had made title to the land, and to a rent in gross, and damages entirely assessed, where the title to the rent was insufficient, and therefore the judgment was reversed quoad the damages. Mo. 142. pl. 283. Arg. cites 10 H. 7. 23. Pennington's case.

Br. Damages, pl. 201. cites 1 H. 7. 23. S. P. and so are all the editions, be 10 H. 7.

but no such point appearing there, they all seem misprinted, and that it should be 23. a. b. pl. 27.

19. In debt on a lease for a year, made in London, of lands in Wandsworth in Surry, the defendant pleaded four pleas triable in Surry; one issue was found for the plaintiff to the damage of 12d. and another for him, to the value of 10d. and a third for him to the damage of 6s. 8d. and the fourth issue against the plaintiff, and would have assessed the costs of every issue found for the plaintiff by itself, as they had found the damages; but the Court ordered them to tax the costs intire, and so they did, viz. to 18d. &c. Keilw. 48. a. pl. 1. Hill. 18 H. 7. Collet v. Hall.

20. Trespass brought for breaking of his close, and beating of his servants, and in his declaration he did not lay per quod servitium suum amisit; damages intire were given, and for this omission in the declaration the judgment was arrested. 2 Bulst. 102. cites 10 Rep. 130. 2. Mich. 14 and 15 Eliz. B. R. Pooley v. Osborn.

5 Rep. 108. a. cites S. C.

21. In a replevin the parties were at issue upon the property, and it was found for the plaintiff, and damages intire were assessed; and not for the taking by itself, and for the value of the cattle by themselves; for the judgment upon that is absolute, and not conditional; and also, if the plaintiff had the cattle, the defendant might have given the same in evidence to the jury, and then they would have assessed damages accordingly, viz. for the taking only. [255] Godb. 98. pl. 110. Mich. 28 and 29 Eliz. C. B. Anon.

22. Error; the plaintiff counts in replevin quod adhuc detinet; and the jury assessed the value of the beasts, and damages intirely; whereas they ought to sever them; for he may have the one, and not the other; and the judgment for this cause was reversed. Cro. E. 59. pl. 4. Trin. 29 Eliz. B. R. Ash v. Wood.

Le. 42. pl. 54. Wood v. Foster. Mich. 28 & 29 Eliz. seems to be S. C. Upon

this writ of error was brought, and the plaint was of 1000 cattle, but the proof extended but to 265. and notwithstanding the number set down in the plaint be by plea of the defendant, quodam modo admitted, and the lesser number furnished, and the contrary not proved shall go in mitigation of the damages, and the jury shall conform their verdict in the right of damages according to the proof of their number, notwithstanding that number set forth in the plaint be not denied by the defendant's plea, and so it was put in ure in this case. — Godb. 112. pl. 135. Wood v. Ash, S. C. but S. P. does not appear. — Ow. 139. S. C. but S. P. does not appear.

23. The defendant promised to do several things, and the plaintiff alleged two breaches, one whereof was insufficient, and the defendant pleaded non assumpsit; resolved, that it shall be intended that they gave damages for both; and 2dly, That inasmuch as the plaintiff had no cause of damage for the one, therefore judgment

Le. 170. pl. 238. Bedel v. Moor, S. C. and judgment was staid. — In covenant given the breach

assigned
was *in reus*
covenant,
and it ap-
peared, that

for the one he had no cause of action, and for the other a good cause, and issue was joined upon both, and found for the plaintiff in both, and damages intirely asselled. The plaintiff could not have judgment. Cro. E. 685. pl. 19. Trin. 41 Eliz. C. B. Anon.

given for the plaintiff in B. R. was reversed in the Exchequer Chamber. 5 Rep. 108. a. b. cites it as adjudged. Mich. 30 & 31 Eliz. Moor v. Bedle.

Mo. 706.
pl. 987.
Berkley v.
Ld. Pem-
broke, S. C.
and judg-
ment re-
versed.

24. In trespass for *breaking his close and spoiling his grafs*, the jury gave damages intire as well for breaking the close as spoiling the grafs, whereas the plaintiff had only the ear-grafs, in which case, *trespass quare clausum fregit* would not lie for him, and therefore could not recover the damages. 3 Le. 213. pl. 282. Mich. 30 & 31 Eliz. B. R. Hitchcock v. Harvey.

25. Error was brought of a judgment, and assigned, first, because the action is an action upon the case for disturbing him to exercise the office of the keeper of a walk in the forest of P. and supposing that he was seised of the manor of S. to which manor the office of the custody of the said forest appertained; and that he and all those, whose, &c. time whereof, &c. by reason of the said office, had had, &c. *omnia bona & catalla forisfacta* within the said forest, except bona, & *catalla forisfacta secundum assisam foreste*, &c. whereas there cannot be a prescription to have *omnia catalla forisfacta*, &c. and then there be damages demanded, and given for a profit, which he could not have. A third error assigned was, because the disturbance is alleged 23 December per quod a *predicta* 23 Decem. 35 usq; 10 Feb. next following, he lost the profits of the office; and he shews not any cause whereby he lost the profits from the 23d of Decem. And yet damages are given for that time also, where damages are not to be given. For it is not alleged, that he was kept out from the exercising of the office, nor any disturbance after the 23d of Decem. nor with a continuando. Wherefore for these errors and imperfections in the declaration, and divers others, without regarding any matter in law, it was awarded, that the first judgment should be reversed. Cro. E. 560. pl. 17. Pasch. 39 Eliz. B. R. Pembroke (Earl of) v. Sir Henry Barkley.

S. C. cited
24 Rep. 7. a.

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26. *Trespass* of battery. Two of the defendants plead *de son assault demesne*. The third pleaded *not guilty*. Both issues were found for the plaintiff, and several damages found against them who pleaded severally, and ruled to be ill: for it is one joint and entire offence by the plaintiff's action; and when all are found equally guilty, the damages ought to have been entire. But if in trespass against divers, the one be found guilty in part, and others in all, there the damages shall be several. Cro. E. 860. pl. 32. Mich. 43 & 44 Eliz. C. B. Austen v. Willward.

27. In battery the baron justifies, for that the plaintiff assaulted his feme, in aid of whom, &c. The feme by herself pleads and justifies *de son assault demesne*; the plaintiff says, *de injuria sua propria absque tali causa*; and both issues found for the plaintiff, and damages entirely given, and now alleged in arrest of judgment, that the trial was ill; for the feme by herself cannot plead, and the

the damages being entirely assessed, all was ill; and of that opinion was the Court; and awarded that they should replead. Cro. J. 239. pl. 3. Pasch. 8 Jac. B. Watton v. Thorpe.

28. Error of judgment in *assault, battery, and wounding*. Error was, that the defendant *quoad the battery and wounding was not guilty*; & *quoad the assault, justifies*. The issue was joined, de son tort de mefin. Both issues were found against the defendant, and for the first battery and wounding 6d. damages, and for the assault 1d. damages. Per Cur. the jury ought not to have given damages for the assault, for it was included in the first issue, and that being tried, this issue needed not, and they having found damages several, it is double damages for one and the same thing, which ought not to be, and therefore the judgment was reversed. Cro. J. 251. pl. 5. Mich. 8 Jac. in B. R. Candlish's case.

29. In an action of *trespass against three defendants, the first pleads generally non culp. to the whole*; the second pleads *as to part, non culp.* and the third, *as to another part, pleads non culp.* Issues joined against them all. The jury found the first defendant guilty of the whole, and the other defendants guilty of the several parcels, and did assess intire damages for the plaintiff, and judgment given accordingly in C. B. for the plaintiff, and a writ of error brought to reverse the judgment, and this only assigned for error, quia juratores se male gesserunt in veredicto dando Curia, this is a clear error, and for this error judgment was reversed per Curiam, and a new trial to be had. Bullt. 50. Mich. 8 Jac. Mills v. ———

11 Rep. 9. a. b. Miles v. Prat, S. C. cited, and the verdict quashed, because the damages were assessed severally, and a venire facias de novo was awarded, and all the issues found for the plaintiff, and intire damages assessed, but by reason of discontinuances the judgment was reversed. ——— Cro. J. 303. pl. 5. S. C. and judgment reversed for want of continuances.

30. If an action of *debt* be brought upon two contracts and both found for the plaintiff, in that case the jury may tax damages intire; but the safer and better way is to sever the damages; for it may come to pass that an action will not lie for one of the two, and if it will not lie, then your labour and charge is lost. Brownl. 70. Hill. 9 Jac. Anon.

31. *Trespass of assault and battery* against two, who plead not guilty, and verdict for the plaintiff against both. The jury assessed several damages to the plaintiff, and costs to the plaintiff entirely against both, and held good. Bullt. 157. Trin. 9 Jac. Sampson v. Cranfield.

For it is a joint act, and the damages are to be intire; but in the case of battery it is not a joint act, for the battery of the one cannot be the battery of the other, and the battery of one may be greater than of the other. Bullt. 157. in case of Sampson v. Cranfield. ——— S. C. cited as to the first point, Arg. and said, that every trespass is joint and several both, and not guilty is the several plea of them all; for one may be found guilty, and the other not, and consequently there is no difference where the pleas are joint and where several, and Heydon's case is expressly so. a Show. 470. Pasch. 8. Jac. 2. B. R. in case of Rodney v. Stode. ——— Carth. 19. Mich. 3 Jac. Rodney v. Stode, S. C. adjudged and affirmed in the Exchequer Chamber, and in parliament, which was trespass against three, and the jury found them all jointly guilty, but severed the damages which ought to have been joint, but by the plaintiff's entering a noli prosequi as to two of the defendants, the fault in the verdict was cured. ——— 3 Mod. 101. S. C. and admitted that the damages should be intire where the action is joint; but where the facts are several, damages should be assessed severally; but per Cur. when several are found guilty criminally, the damages may be severed in proportion to their guilt; and judgment for the plaintiff.

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But either-
wise in tres-
pafs for cut-
ting and
carrying
away his
trees, &c.

11 Rep. 5. Sir John Heydon's case, S. C. resolved accordingly, because such other defendants are privy in charge, and says, that with this accords 44 E. 3. 7. b. adjudged in point, and F. N. B. 107. (E) accordingly. — Brownl. 233. Heydon v. Stiles, S. C. that execution was given against all the defendants for the greatest damages.

32. Where an action of *battery* is brought *against several*, and the defendants are all charged with one *battery*, though the *declarations are several*, yet they being with a *simul cum*, &c. shew that they are joint trespassers there, though damages are severally given and very different, as 200l. against one, and 25l. against another, &c. yet what are given against one, shall serve, and may be taken against the other; and if the *damages are too great*, any of the defendants may have an *attaint*, though he be not the same party against whom the verdict was found, and so a judgment in C. B. was affirmed in B. R. Cro. J. 348. pl. 2. Trin. 12 Jac. B. R. R. Cobb v. Heydon.

Brownl. 196. Cook v. Jenman, S. C. the plaintiff cannot have several damages, but (as in Heydon's case) he may chuse the best.

33. In *trespass for breaking his house and beating him*, if it be *against joint trespassers*, there can be but one *satisfaction*, and therefore if they are sued in one action, though they may *sever in pleas and issues*, yet one jury shall assess damages for all; and as to the damages he that is no party to the issue shall have an *attaint*, as well as his fellows, and if they are sued in several actions, though the plaintiff makes choice of the best damage, yet, when he hath taken one satisfaction, he can take no more, and if he requires two, an *audita querela* will lie. Hob. 66. pl. 69. Trin. 12 Jac. Cocke v. Jennor.

Mo. 887. pl. 2247. S. C. the damages being intirely assessed for the default of grinding from the 2 Jac. to the 28 Jac. whereas the lease of the plaintiff was made but in the 22 Jac. the judgment was arrested. — Brownl. 18. S. C. and upon motion in arrest of judgment it was adjudged naught.

34. In *case for not grinding at plaintiff's mill*, a fault was, that he assigned, the breach anno 12, & *diversis vicibus* between that and anno 2, which was long before the plaintiffs had interest, and the damages were given intire upon not guilty to the whole, which damages shall be understood to be given not according to the law, but according to the allegation of the plaintiff, who lays his damages for all, and the verdict of laymen, who find him guilty de *præmissis* to the damage of, &c. and makes no difference that the special breach is right anno 12, and the rest comes by *diversis diebus*, like a trespass with a *continuando*, for which damage is also given. Hob. 189. pl. 233. Trin. 14 Jac. Harbin & Ux. v. Green.

34. In *assumpsit* the plaintiff counted of *two several assumpsits*, whereof one was an *express assumpsit* for 137l. and the other was an *implied assumpsit* for 48l. the defendant pleaded *non assumpsit generally*; this extends to both the assumpsits, and entire damages being given was held good. Jenk. 331. pl. 63. cites Cro. J. 544. [Mich.] 17 Jac. Heath v. Dauntley.

35. Action upon the *case*. The plaintiff declared that he at L. such a day, &c. lent to the defendant a gelding to ride from L. to the city of E. and safely to re-deliver it back to the plaintiff; and that the defendant to deceive the plaintiff rid the gelding from L. to E. and from E. to L. and so abused him thereby, that he became of little worth,

worth, and notwithstanding at E. he required him to re-deliver him such a day, he refused to re-deliver him. Intire damages being given for all these torts, all the Court delivered their opinions seriatim, that the trial was good and the damages well assessed. First, because the principal tort was, the not delivering upon request at Exon, according to the contract. And then when he denied the re-delivery, and after converted him to his own use, the plaintiff may well have an action for both, and together. And although perhaps the defendant might have demurred (as the Lord Herbert conceived) for the doubleness of the declaration; yet when he demurred not to it, but pleaded not guilty of the premisses, and is found guilty, that makes the declaration good, and there is not any cause to stay the plaintiff's judgment. Cro. C. 20. pl. 13. Mich. 1 Car. C. B. Whyte v. Ryden.

37. *Trover* and conversion of 200 loads of coals; upon non guilty, the defendants were found severally guilty for several loads, and were found severally not guilty for the residue, and intire costs; reversed, by all the Justices and Barons on error brought in the Exchequer Chamber, that the plaintiff should have several damages; for being found severally guilty of several parcels converted, he shall have judgment accordingly. Cro. C. 54. pl. 13. Mich. 2 Car. Player v. Wain and Dewes.

38. *Trespass*. Plaintiff declares, that the defendant did break his close, and eat his grafs, &c. cum averiis suis, viz. oxen, sheep, hogs, avibus Anglice turkies; and the judge in this case did hold, that turkies are not comprised within the general word averia, which is an old law word, and these fowls came but lately into England, and upon this it was directed to sever the damages; for otherwise, if the damages shall be jointly given, and if it be ill for this of the turkies, for the reason above said, it will overthrow all the verdict. Clayt. 50, 51. pl. 88. August 13 Car. before Barkley, judge of assise. Usley's case.

39. W. brought an action of trespass, for assaulting, beating, and wounding him, against four several persons; three of them plead not guilty, and are found guilty; and the fourth pleads not guilty to part, and justifies for the rest, viz. the wounding only; yet the verdict was found generally for the plaintiff, and intire damages assessed, and judgment given, and a writ of error was brought, and the error assigned was, that the damages ought not to be intire against all, because that the fourth person was only found guilty of part of the trespass, viz. the wounding, and therefore, as to him, the damages ought to have been severed, in relation only to the wounding, and not as it is; for so damages should be given twice for the same thing; first against the three, and then against the fourth, which the Court granted, and reversed the judgment. Sty. 5. Hill. 21 Car. Whitwell v. Short.

40. B. brought an action of trespass against D. in C. B. for taking away three cows, and had judgment against him upon a nil dicit. The defendant brought a writ of error in this court to reverse the judgment. The error assigned was, that for two of the cows there was no value declared, and yet intire damages were

given for them all, which was not good. Roll Ch. J. said, this is a judgment upon a nil dicit, and so there is no verdict to help it. Sty. 174, 175. Mich. 1649. B. R. Dell v. Brown.

41. In an action of *trespass for fishing, and cutting down two acres of ozers*, the damages ought to be several, as the trespass is; per Cur. Keb. 18. pl. 51. Pasch. 13 Car. 2. B. R. in evidence to a jury in case of Rich v. Hall.

42. If any part of the declaration be uncertain, and intire damages are given, the plaintiff can have no judgment; but in the certainty of the allegation, the Court requires no more than the nature of the thing required. Gilb. Hist. of C. B. 98. cites 2 Saund. 319. Pasch. 23 Car. 2. Bennet v. Holcomb.

[259] 43. Trespass for entering his close, and moving and carrying away his corn and grass there, &c. with a continuando of the same cutting and carrying away from the 16 August 21 of the King now to 30 Sept. 22 of the King. It was moved in arrest of judgment, that it was impossible that when he had cut the corn there growing the 16th August 21, that he should continue cutting till 30 September 22. But, per Vaughan Ch. J. there is a difference between things legally impossible, as in the case of assumpsits, there, though one be bad, yet it shall be presumed that the jury gave damages for it, because it is only legally impossible; and non constat to the jurors, whether by law it were good or not; but where a thing is naturally impossible, as it is here, it cannot be presumed that the jurors gave any damages for that which they might, by presumption, know to be impossible. Sed adjournatur. Freem. Rep. 83. Pasch. 1673. C. B. Nicholls v. Reeve.

44. In the declaration there was an *indebitatus assumpsit*, and intire damages were given; and it was not said for what he was indebted; so that it might be for a bond, or rent, &c. And it being bad for that part, quod consilium non negavit, it was bad for the whole; and so judgment arrested. Freem. Rep. 162. pl. 177. Trim. 1674. Gadbury v. Day.

45. *Trespass against A. B. and C. for an assault and battery and imprisonment, and taking two silver buttons, &c. B. and C. plead not guilty to the whole*, upon which they were at issue, and A. as to the force and arms, pleads not guilty; and as to the residue of the trespass, *actio non*, &c. for that the plaintiff assaulted them, and so to issue (but say nothing of the imprisonment, and taking the buttons.) The plaintiff had a verdict, and intire damages; adjudged, that the plaintiff having charged them all jointly with the whole matter, though one of them had committed the battery, another had been guilty of the imprisonment, and the third of taking of the buttons, yet being all done at one time, they were all guilty of the whole, and shall be charged all of them with the whole damages. 3 Lev. 324. Hill. 3 W. and M. in C. B. Smithson v. Garth.

46. An action was for words spoken at several times, viz. He got a witness to forswear himself in such a cause, you or he (intuendo the plaintiff) hired one B. to forswear himself. And for these following words (spoken at another time; two dyers are gone off (intuendo become bankrupt) and, for ought I know, H. will be so too

Damages.

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too within this time twelve-month; verdict for the plaintiff, and joint-damages given. Judgment for the plaintiff. 10 Mod. 196. Hill. 12 Ann. B. R. Harrison v. Thornborough.

(E) How to be given. In what Cases *jointly* to the Plaintiffs. To *Baron and Feme*.

This in Roll
is Letter (S)
Ser tit. Ba-
ron and
Feme (E. b)

[1. **I**N an *affise by baron and feme*, if it be found they were *disseised*, they shall recover damages of the issues in common. 11 H. 4. 16. b. 17. adjudged.]

Br. Joinder
en Action,
pl. 98. cites
S. C. &
S. P. ac-

cordingly. — Br. Judgment, pl. 20. cites S. C. & S. P. — Br. Damages, pl. 51. cites S. C. & S. P. — Fitzh. Judgment, pl. 70. cites S. C. — 2 Inst. 336. cites Trin. 4 H. 4. Rot. 24. Coram Reg. Burcheller's case.

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[2. *But if it be found that certain goods of the baron were taken upon the land*, the baron only shall have judgment for the damages for them. 11 H. 4. 17. adjudged.]

Fol. 571.

Br. Damages, pl. 51. cites S. C. — Br. Joinder en Action, pl. 98. cites S. C. — Br. Judgment, pl. 20. cites S. C. — Fitzh. Judgment, pl. 70. cites S. C. — 2 Inst. 336. Ld. Coke cites S. C. and 7 H. 6. 30. b. and says, that in *affise* brought by the baron and feme, he and his feme shall recover seisin of the land, and he alone, upon that original brought by him and her, shall have damages, which is worthy of observation. [But it seems, this is to be understood only of damages, as to the goods] — Ibid. cites Trin. 4 H. 4. Rot. 24. Burcheller's case, where damages for the goods were to both, and for that reason the judgment was reversed, because the wife had nothing in them.

[3. In *trespafs by baron and feme, for imprisoning the feme till a fine paid*; for all the trespasses but the fine they shall recover damages in common. 11 H. 4. 16. b.]

Br. Damages, pl. 51. cites S. C. — Fitzh. Judgment, pl. 70. cites S. C.

[4. *But for the fine* the baron shall recover damages only. 11 H. 4. 16. b. because it was his chattel.]

Br. Damages, pl. 57. cites S. C. — Fitzh. Judgment, pl. 70. cites S. C.

5. If *baron and feme recover in writ of ward*, and the *baron dies*, the execution of damages shall survive to the feme, and not to the executors of the baron. Br. Jointenants, pl. 61. cites 19 E. 3. and Fitzh. Scire Facias, 119.

6. In *quare impedit against baron and feme*, the plaintiff recovered by *false oath*; the baron died, and the feme brought *attaint for the damages levied of the goods of the baron*, and yet the feme by the attaint was restored to the damages lost, and to the advowson, and recovered other damages by the attaint; because if the first damages had not been levied of the goods of the baron, they should be levied of the goods of the feme, who was party to the judgment, and therefore the attaint survived as well for damages as for the principal. Br. Jointenants, pl. 46. cites 46 Ass. 8.

7. In trespasses of the battery of the baron and feme, the jury shall sever the damages; but for the one part the writ was abated; for

Br. Trespass, pl. 190. cites S. C.

for the baron and feme shall not join in battery of the baron. Br. Damages, pl. 85. cites 9 E. 4. 51.

8. In debt on a bond made to K. a feme dum sola, who afterwards married, and the action was brought by K. and her husband, and the jury assessed the damages to the baron and feme *ratione detentionis debiti*, and held good; for the damages shall be to both. Cro. E. 259. pl. 42. Mich. 33 and 34 Eliz. B. R. Gurney v. Cleere.

(F) To Joint-Tenants. [Given jointly in what Cases.]

Fitzh. Judgment. pl. 70. cites S. C.—
Br. Damages, pl. 51.
[1. IF two joint-tenants bring an assise, and the one is severed, if it be found that the other had goods taken upon the land, he shall recover sole damages for them. 11 H. 4. 17.]

cites S. C. that if three jointenants are, and one of them releases to one of the others, and they are disseised, the damages shall be severed for the third part; per Weabury.—2 Inst. 236. S. P.—

[261] 2. If two bring assise of mortdancester, and recover, and one dies before execution, the damages shall not survive; contrary after execution of the land: but in debt and trespass, the damages shall survive, and herewith agrees Fitzh. Execution 255. The reason seems to be, because before execution of the land, the damages shall be of the nature of the land; contrary after execution. Br. Jointenants, pl. 56. cites 14 E. 3. and Fitz. Execution 75.

3. In assise by several, if one is nonsuited, this is not [* the nonsuit of the others] but only for the quantity of damages [for himself] and he shall be summoned and severed, and the others shall proceed and recover their parts of the land and of the damages, and so damages severed, quod nota. Br. Damages, pl. 109. cites 16 Aff. 14.

↳ This is according to the year-book, which cites M. 13. and M. 14. E. 3.

(F. 2) Recovered. By Parceners; and How. Jointly, or not.

1. TENANT for life, the reversion to two coparceners, did waft, the one parcener had issue and died, the tenant did waft again, the other and the niece joined in waft, and this matter was found, and they recovered the place wafted and treble damages, viz. each recovered for the last waft, and the other damages only for the first waft, and so see that damages survived. Br. Jointenants, pl. 48. cites 45 E. 3. 3.

2. If abatement, or waft, be done against two coparceners, and the one has issue, and dies; and the issue and the other join and recover the land; yet the damages shall be severed. Br. Joinder in Action, pl. 98. cites 11 H. 4. 16.

Br. Judgment. pl. 80. cites S. C. & S. P.
—Br. Damages, pl. 51. cites S. C. & S. P.

3. If three coparceners *recover land and damages in an assise of moridancester*, albeit the judgment be joint, that they shall recover the land and damages, yet *the damages being accessory, though they be personal, do in judgment of law depend upon the freehold, being the principal which is several*. And though the words of the judgment be joint, yet shall it be taken for distributive. And therefore if two of them die, the *intire damages do not survive*, but the third shall have execution according to her portion; and this is another exception out of our author's rule. *But if all three had sued execution by force of an elegit, and two of them had died, the third should have had the whole by survivor, till the whole damages be paid.* Co. Litt. 198. a.

4. If the aunt and niece join in an action of waste, for waste done in the life of the other sister, the aunt shall recover the damages only, because the same belongs not by law to the niece. And some hold the damages in that case to be the principal. Co. Litt. 198. a.

As to giving Damages Jointly, See Judgment (E).

(G) *Against Whom they shall be given.* [262]

[1.] If the lord join himself to his bailiff in an *avowry*, the plaintiff shall not recover damages against the lord, but only against the bailiff; for the bailiff only continued party to the issue. 8 H. 6. 5. Curia. Brook Damages, 68.] Fitsh. Damage, pl. 100. cites S. C.

[2. In *detinue for a writing against executors, supposing it come into their hands after the death of the testator*, if the executors have been at all times ready to render it after it came into their hands, &c. 22 E. 3. 9. b.] Fitsh. Damage, pl. 103. cites S. C. that in such case no damages shall be given against them. — See (O) pl. 5. infra S. C.

3. Stat. Glouc. 6. E. 1. cap. 1. *Whereas heretofore damages were not awarded in assises of novel disseisin, but only against the disseisors.* Damages were not given in assise against any but

against the disseisor, per Littleton, Pool, and Spilman, quod verum est. Br. Damages, pl. 153. cites 37 H. 6. 35. — Before this statute the disseisee had no damages against any but the disseisor himself, by reason whereof the statute gave damages *against the mesne occupiers for the non sufficiency of the disseisors*, and this remedy is given to the disseisee by assise only, and not in trespass; for it is against the same person that did the disseisin, and he shall answer for all the damages; for if one disseises me, and infeoffs B. who cuts wood on the land, and C. disseises B. and does trespass on the land, or J. S. cuts the trees, the possession of the fee of B. being in B. my disseisor, yet, when I re-enter, B. is chargeable to me in trespass, for the whole trespass done by any person in the mean time, and he has remedy over against any person that was trespassor to him; per Cur. Keilw. 1. b. pl. 2. Mich. 12 H. 7. in Ld. Brooks's case.

4. (2) * *It is provided, that if the disseisors do alien the lands,* * The letter of this law
extends only to them that came in by title, as by feoffment or fine after the disseisin; but by equity it extends to them that came in by wrong, and to them also, whose estate was before the disseisin; for example, if the disseisor were disseised, the second disseisor was within this statute; for if he that comes in by title, shall be within the remedy of this law, a fortiori, he that comes in by wrong; and so it is of all others, that come in under the disseisor, though it be not by alienation. a. Inst.

No lessee for years, or tenant by statute, staple, or merchant, or the like, that have but a chattel, shall be accounted a mean occupier within this statute, but he that has the inheritance, or freehold at the least; otherwise he is not said to be a tenant of the land; and so much is implied in this word (*alien*) which cannot be intended of a lessee for years, &c. where he that brings the assise, has right to the inheritance or freehold; but where tenant by statute merchant, or staple, &c. brings an assise, there lessee for years, or tenant by statute, merchant, or staple, &c. may be a mean occupier, because the plaintiff in the assise has right but to a chattel. a Inst. 284.

* Hereupon. * And have not whereof damages may be levied, they to whose hands do follow such tenements shall come, shall be charged with the damages; such conclusions in law; that if the disseisor be sufficient to yield the whole damages, he is solely to be charged therewith; for then this statute extends not to the tenant; and as it appears by the preamble, he was not answerable by the common law. The second conclusion is, that for the insufficiency of the disseisor, the tenant shall answer the damages by this act. The third conclusion is, that if the disseisor be able to yield part, and not the whole damages, both shall be charged, and therefore judgment is ever given as well against the disseisor (though he be found insufficient) as against the tenant. a Inst. 284.

† The ground

So † that every one shall answer for his time.

hereof is, quod bonæ fidei possessor in id tantum, quod ad se pervenerit, tenetur. Hereupon several conclusions are grounded; 1st, albeit the mean occupiers are neither disseisors nor tenants, yet if they are not named in the assise, no judgment can be given against them, neither can they be charged for the time they take the profit. a Inst. 285.

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adly, Though they be named, yet as hath been said, the disseisor must be found by the assise to be insufficient, and the mean occupiers must be found to take the profits; for if they be omitted, and none but the disseisor and tenant named, and the disseisor is found insufficient, and no further inquired of, the tenant shall be charged for the whole. a Inst. 285.

gdly, If the assise be brought against the disseisor and the tenant, and it is found by the assise, that the disseisor is sufficient, and that the disseisor infeoffed A. who infeoffed B. who infeoffed the tenant, and that A. had it one year, and B. half a year, and the tenant two years; upon this special finding, the tenant shall answer damages but for his time, for "Every one shall answer for his time." And the plaintiff has lost his damages against A. and B. for that they were not named in the writ. a Inst. 285.

thly, If the disseisor A. and B. and the tenant in the case before, be all named, and the disseisor A. and B. are all found insufficient, the tenant shall answer for the whole; for although the letter of this law is, where the disseisors have nothing, &c. yet these words, "every one shall answer, &c." do imply (if they be sufficient,) for otherwise they cannot answer, that is, they cannot satisfy; for in this sense (answer) is here taken. a Inst. 285.

thly, It shall never be inquired of the tenants insufficiency, for against the disseisor and him, must the assise of necessity be brought. a Inst. 285.

thly, Upon these words, "Every one shall answer for his time," several judgments shall not be given, but one judgment is to be given intirely against all, and so was it ever used since this statute; but the sheriff upon the execution may use such insufficiency as justice requires. a Inst. 285.

And it is said, if the assise be brought against the disseisor and the tenant, and judgment given for the plaintiff, and a writ issues to the sheriff, and he returns, that the disseisor is insufficient, the plaintiff shall have process to levy it of the tenant. a Inst. 285.

thly, This gives no damages, where none was recoverable in the assise at common law, but gives damages against the tenant for the insufficiency of the disseisor, as hath been said. a Inst. 285.

As if he in the reversion upon a term for years, or tenant by statute staple be disseised, he shall have an assise to recover the state of the land, but shall recover no damages for the profits of the lands, because they belonged not to him. a Inst. 285.

In assise the case was, that the tenant was arrear of his rent for seven years, and the Ld. distraint, and a stranger made rescue; the Ld. brought assise against both, and all this was found, and the arrears 17 mark, and that the disseisor is not sufficient, and yet it was agreed, that he shall recover generally against the one and the other, without shewing what; and yet per Finch, the arrears shall be against the tertenant, as in case of recovery of land, but as to the damages it shall be against the disseisor; and per Candish, the statute, that every one shall answer for his own time, is understood, where the disseisor aliens after the disseisin, and yet judgment as above. Br. Assise, pl. 16. cites 40 E. 3. 24. — a Inst. 284. & P. cites 20 Ass. pl. 2. and 20 E. 3. 24. (but is seems misprinted, and that it should be according to Br. [viz. 40 E. 3. 24. & 40 Ass. pl. 3.]

But in a like case the plaintiff surmised, that the disseisor is not sufficient, and prayed it might be inquired by assise, and so it was, and he was found not sufficient; and that the other was not tenant but for half a year, and yet judgment ut supra, and that the disseisor shall be taken, and that the plaintiff recover the arrears of a term, pending the writ. Br. Assise, pl. 16. cites 40 Ass. p. 2. Quod nota. — Fitzh. Assise, pl. 390. cites S. C.

If the disseisor committed the disseisin with force, and infeoffed A. who infeoffed B. who infeoffed

C. an assise is brought against them all, and treble damages for the insufficiency of the disseisor shall be recovered upon all, according to this act, "Every one shall answer for his time," that is, what damages should be recovered against the disseisor, if he were sufficient, shall be recovered for his insufficiency against the mean occupiers and the tenant only. 2 Inst. 285.

5. (3) *It is provided also, that the disseisee shall recover damages in a writ of entry upon novel disseisin against him that is found tenant after the disseisor.* The disseisee shall recover damages by this act in a

writ of entry sur disseisin in the post; as if the tenant comes to the land by disseisin, intrusion, or abatement, or when by alienation, it is out of the degrees; for the words be, "against him who is found tenant after the disseisor," within which words, he that comes in the post is included. Note, the writ of entry in the post is given by the statute of Marlebridge, cap. ultimo; for the disseisee was driven to his writ of right at the common law. 2 Inst. 286.

If the disseisor makes a feoffment in fee, and the disseisee dies, the heir of the disseisor shall not recover damages by this act against the alienee; for this branch of the act provides for the disseisee, and not for the heirs. 2 Inst. 286.

If the disseisor makes a deed of feoffment, by the which he infeoffed A. and B. and makes livery of seisin to A. in the name of both, B. never agreeing to the feoffment, nor taking any profit of the land, A. dies; in this case by the law, the freehold and inheritance is vested in B. by survivor; and in a writ of entry in the per, brought by the disseisee against B. he may, as is aforesaid, plead the special matter, and that he never agreed nor took any profits, and discharge himself of the damages for the cause aforesaid. 2 Inst. 286, 287.

The statute lays, "he who is found" tenant, and yet if a writ of entry be brought against two jointtenants, and the one disclaims and the other takes the whole tenancy upon him, and pleads in bar, and it is found against him, the demandant shall recover damages for the whole against him, because he took upon him the whole tenancy. 2 Inst. 287.

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A disseisor infeoffs A. who infeoffs B. The disseisee brings a writ of entry in the per & cui against B. who vouches A. who pleads and loses; judgment for the damages shall be given against the vouchee, for he is found tenant in law. 2 Inst. 287.

In this second branch the tenant only is charged with the whole damages, though there were divers mean tenants, for the words "every one shall answer for his time," is only in the case of an assise upon the 1st branch; neither ought the writ of entry to be brought against any, but against him that is the tenant of the land; but in some case, another than the disseisee shall recover damages by this branch; as the successor of an abbot, but otherwise of bishops, or other sole secular bodies politicke. 2 Inst. 286.

If the tenant comes to the land by act in law, which he cannot withstand, and where there is no act or default in him, in that case he shall not be charged; as if the disseisor aliens to A. and his heirs, and A. dies without heir, the law (that there may be a tenant to a stranger's præcipe) does cast the land upon the lord; in this case, if the lord does not take any profits of the lands, in a writ of entry in the post brought against him for the land, the lord may plead the special matter, and how that he never took any profits of the lands, and so discharge himself of the damages; for albeit he be a tenant of the land, yet he is no tenant against his will within the meaning of this law, because there is no wrong nor default in him. 2 Inst. 285.

But if the lord by escheat does enter, and take the profits of the land, then shall he be charged as a tenant within this act, for albeit he could not withstand the escheat, which made him tenant in law, yet might he have refrained to take the profits, which in right belonged to the disseisee, but his rent or valuable services shall be recovered [recouped] in damages. 2 Inst. 286.

And so it is in all respects when the alienee of the disseisor dies seized, and the land descends to his heir, he may refrain from the taking of the profits and plead the like plea, and discharge himself of the damages. 2 Inst. 286.

6. (4) *It is provided also, that where before this time damages were not awarded in a plea of mortdancestor (but in case where the land was recovered against the chief lord) that from henceforth damages shall be awarded in all cases where a man recovers by assise of mortdancestor, as before is said in assise of novel disseisin.* In construction of general references in acts of parliament, such reference

must be made only as may stand with reason and right. 2 Inst. 287.—In mortdancestor, if the tenant vouches, and the vouchee pleads and loses, in this case the plaintiff shall recover against the tenant the land, and the tenant in value against the vouchee, and the plaintiff shall recover his damages against the vouchee, and by this act damages shall be recovered in a *super oblit.* 2 Inst. 287, 288.

7. (5) *And likewise damages shall be recovered in writs of cognage, Aiel, and Besalek.*

8. In assise, it was inquired if the disseisor was sufficient to render damages, and of the tertenants for the time, and found the disseisor insufficient, and that an infant was tertenant, but was in ward, and therefore he was not charged, but the disseisor only. Br. Damages, pl. 105. cites 22 Ass. 28.

9. It was found that the disseisor was not sufficient to render damages in assise of rent, and the tenant had not been tenant but half a year, where the arrearages were arrear by seventeen years, and yet judgment of arrears and damages were given against the one and the other, and this in assise of rent. Br. Damages, pl. 17. cites 40 E. 3. 24. and the like case, 40 Ass. 3.

10. In false imprisonment against two, the one came and pleaded, and it is found to the damage, &c. and after the other came and would have pleaded, and could not by reason of such like issue founded against him at the suit of the same plaintiff in trespass, by which the plaintiff had judgment to recover damages against the one and the other, and yet the last who pleaded was not party to the first issue, but he was party to the original, and therefore charged of damages by award; for he may have attaint thereof, quod nota. Br. Damages, pl. 29. cites 44 E. 3. 7.

[265] 11. Scire facias against the heir of acquittal acknowledged by his father, he was returned warned, and did not come, by which distringas issued, and no judgment to recover the acquittal and damages, as it should have been against his father, if he had appeared and pleaded, and it had been found against him. Br. Damages, pl. 175. cites 46 E. 3. 31.

12. In walf it was agreed, that if a man leases for term of life the remainder over in tail, the remainder in fee to the tenant for term of life; the tenant for life did walf, and he in remainder in tail brought action of walf, and recovered, and died without issue before execution; his executors shall have execution of the damages, and yet now the fee is vested in the first tenant; for the damages were vested by the judgment. Br. Damages, pl. 177. cites 50 E. 3. 3.

13. Where the tenant vouches in præcipe quod reddat, where damages are to be recovered, and the vouchee enters into the warranty and loses, the damages shall be recovered against the vouchee, therefore he shall have writ of error. Br. Damages, pl. 45. cites 8 H. 4. 5.

14. Where two bring several writs of detinue against one and the same person, so that the plaintiffs interplead, there the plaintiff, if he recovers, shall have his damages against the other who enteredpleaded with him, and not against the defendant; therefore beware of covin to make one enterplead, for it is nothing worth. Br. Damages, pl. 9. cites 9 H. 6. 18.

15. It was said that the heir in writ of error, upon erroneous judgment [of lands] entailed by his ancestor, shall not render damages unless he has assets per descent, &c. Br. Damages, pl. 10. cites 9 H. 6. 49.

16. Upon rescit upon which damages shall be recovered, the damages

Damages shall be taxed *against the tenant by rescit*. Br. Rescit, pl. 65. cites 22 H. 6. 52.

17. *Trespass against two, the one appears and is convicted, and the other makes default*, he shall be charged of the damages found against his companion. Br. Damages, pl. 131. cites 26 H. 6. and Fitzh. Enquest 16.

18. *If disseisor makes feoffment, and the disseisee re-enters, he shall recover his damages by several writs of trespass as well against the feoffees, as against the disseisor*. Br. Damages, pl. 13. cites 33 H. 6. 46.

19. *And in assise of rent the plaintiff shall recover all his damages against the tenant for twenty years, though he has not been tenant but for one month*. Ibid.

(H) Damages Double [or Treble. In what Cases. And] by Whom the Damage shall be taxed, by the Jury or Court.

[1. **I**n a redisseisin double damages are given by the statute of *Westminster 2. cap. 26.* the jury shall give single damages, and the Court shall encrease them to double. Co. Magna Charta * 116. the words of the statute are, *adjudicentur de cætero damna in duplo.*] * a Inf. 416. S. P. and Roll. seems misprinted.

2. *In assise the defendant sued certificate upon deed of the ancestor of the plaintiff, and the plaintiff denied the deed which was found for the tenant by nisi prius, by which damages were awarded to the tenant to double upon the statute, and that the plaintiff capiatur*. Br. Certificate de Evesque; pl. 33. cites 23 E. 3.

3. *If a man cuts trees, and after suffers the germens to be destroyed, this is double wast, and shall render double damages*. 2 Roll. Wast (E) pl. 27. cites 9 H. 6. 67. 22 H. 6. [266] See the notes there.

4. *If rescous of distress for rent be made, and not vi & armis, single damages shall be, and for vi & armis, treble damages*. Br. Damages, pl. 12. cites 33 H. 6. 20.

5. *B. bailiff of the sheriff of W. was indicted before justices of the peace in their sessions, upon two several indictments; 1st, That he, as bailiff, had received 20s. from F. S. extorsive colore officii; and in the other, that he took 6s. 8d. and judgment against him, and treble damages given upon each. Resolved, that the assessing of treble damages to the party was erroneous; for although, by colour of the stat. of 23 H. 6. where treble damages are given to the party, they might assess them, yet in this case it is erroneous; for they ought first to have enquired of the damages; for perhaps they may be more or less, according to the circumstances; and they cannot assess themselves, without inquiry by the jury; wherefore the judgment was reversed*. Cro. C. 438. pl. 9. 448. pl. 20. Mich. 11 Car. in B. R. Brunlden's case, alias Bumpstead's case. Jo. 379 pl. 10. The King v. Lanierne, S. C. adjudged, that the indictment be reversed for several reasons, among which this was one; and the reporter adds a note, that it is to be considered,

whether damages are to be recovered upon an indictment but that the party shall have action to recover them; besides that it is not clear whether this is an offence by the said statute whereupon treble damages are at all to be recovered.

(H. 2) Recovered. From what Time.

1. **I**N assise, it was found that the plaintiff within age was seised and disseised, and came to the land, and put in his foot, but did not take the profits, and the other ousted him, and yet he shall recover damages from the first disseisin, and therefore it seems that he was not remitted by his entry, for then he ought to recover his first damages in trespass. Br. Damages, pl. 159. cites 26 Ass. 42.

2. If a man has two sons, and dies seised, and a stranger abates, the eldest son dies, the youngest shall not recover damages in mortdancestor, but from the time of his brother's death. Br. Damages, pl. 160. cites * 34 Ass. 10.

3. And if the father has two daughters, and dies seised, the one dies without issue, the other shall not recover damage for the one moiety, but from the time of her sister's death; and, it seems, the reason is, because all the matter appears in the verdict, or in pleading; for otherwise it may be, that there were no more sons than the younger, who brought the mortdancestor, and in the other case, that the father had but one daughter in all; but in writ of aiel, e contra; for there the son cannot make himself heir to the grandfather, without making mention of the father, quam vide diversitatem libro Dr. & Stud. lib. 2. fol. 81. Br. Damages, pl. 160. cites 34 Ass. 10.

4. A man was restored as heir, by suit, by petition to land, of which the King was intitled, and the King brought writ of error, and the first judgment of the issue between the King and him, upon the petition, was reversed, and other issue tried for the King ad damnum for waste in the time of the defendant's father, and in his own time to 40l. and the King recovered the damages against the defendant, as well for waste in his father's time, as in his own time, and yet the heir had nothing by descent from his father, and the reason was [267] because scire facias issued against him generally as heir, and he was returned warned, and made default, quod nota. Br. Damages, pl. 161. cites 39 Ass. 18.

5. If a man be disseised, and the disseisee dies, his heir shall recover damages against the disseisor, but in his writ of entry against the disseisor, he shall recover damages but from the death of his ancestor. 2 Inst. 286.

6. It is a rule upon the statute of Gloucester, that in none of these writs the demandant shall recover damages but from the death of his next immediate ancestor whose heir he is; as if there be grandfather, father and son, the grandfather dies seised, an estranger abates, the father dies, the son, in a writ of aiel, must make his resort as son and heir of the father, son and heir of the grandfather, therefore he shall in that case recover damages but from the death of his father, because he is his next immediate ancestor, and from him the right descended; and so in the writ of befaiel and cosinage; but in the case before, if the grandfather had survived the father, the son shall recover damages from the death of his grandfather.

father, because he is his immediate ancestor, and the right immediately descended to him; et sic de cæteris. 2 Inst. 288.

7. If a man has two daughters and dies seised of lands, an estranger abates, one of the daughters has issue, and dies; the aunt and the niece shall join in an assise of mordaunc', and the aunt only shall recover damages till the death of the sister, and both of them from her death, which stands upon the reason aforesaid. 2 Inst. 288.

8. If there be grandfather, father, and daughter, the grandfather dies seised, an estranger abates, the father dies, his wife being privement enfeint with a son, the son is born, he shall recover damages in a writ of aiel from the death of the father, for now he is immediate heir to the father. 2 Inst. 288.

9. A man sues in the Spiritual Court for a matter which, upon the face of the libel, appears to be of temporal consuance, and obtains a sentence. The defendant appeals first, and then sues out a prohibition. In the declaration upon that prohibition and process thereupon there is judgment against the defendant by nil dicit; and writ of inquiry to damages awarded. Parker Ch. J. was of opinion, that damages were to be given only for the proceedings in the Spiritual Court, since the prohibition delivered. 10 Mod. 319. Mich 2 Geo. 1. B. R. Leeds v. Carlton.

(H. 3) Damages recovered, or taxed. To what Time.

1. In assise the plaintiff recovered damages for a year, which was incurred after verdict, quod nota. Br. Damages, pl. 97. cites 13 Aff. 2.

But Trin. 15 E. 3 such judgment was reversed,

because it was of damages after verdict. Ibid.—S. C. cited 10 Rep. 117. a.

2. In assise the plaintiff recovered the land and the damages taxed by the assise, and damages pending the writ. Br. Damages, pl. 202. cites 18 Aff. 3.

S. P. Br. Damages, pl. 157. cites S. C. and so of arrears

incurred pending the writ.—In assise a man shall recover damages to the value of the issue of the land, pending the writ till judgment. Br. Damages, pl. 43. cites 7 H. 4. 16.

3. Annuity, the plaintiff shall recover the damages in waste, as well for the waste done pending the writ as before. Br. Damages, pl. 43. cites 7 H. 4. 16.

S. C. referred to 10 Rep. 117. a.

4. In assise, and action of waste, the plaintiff shall recover damages pending the writ, and the arrears pending the writ of annuity. Br. Damages, pl. 188. cites 7 H. 4. 16.

5. In writ of entry sur disseisin, or in nature of assise, writ is awarded to inquire of the damages, the demandant shall recover damages till the award of the writ of inquiry of damages, and not further, nor for time after, notwithstanding that the writ of inquiry of damages is pending seven years. Br. Damages, pl. 14. cites 33 H. 6. 47.

10 Rep. 117. a. S. C. cited per Cur. And if in such writ an issue is joined triable by verdict,

he shall recover damages but from the time of the disseisin to the time of the verdict.

6. And

Damages.

6. *And in præcipe quod reddat*, the demandant shall recover damages till the time of the judgment given. Ibid.

7. *But if the Court will be advised of their judgment*, the demandant shall not recover any damages for this time, nor but till the verdict given. For he shall not recover till the time of the judgment, but where the judgment is given immediately upon the verdict. Ibid.

30 Rep.
117. s. S. C.
cited per
Cur. and
says, that
with this accords 7 E. 4. 5. s.

8. *But in præcipe quod reddat of rent of the seisin of the demandant himself*, he shall recover damages and arrears all the time pending the writ till the day of the judgment given. Ibid.

9. *And the same law in assise of rent.* Ibid.

10. *But where a man recovers by default in writ of entry*, he shall not recover damages but till the day of judgment, and if writ of inquiry of damages pends for seven years he shall not recover damages for this time. Ibid.

11. *Assise of rent*, the plaintiff prayed his damages of the rent and damages of the arrears pending the writ, and could not have but damages of the arrears of the rent before the writ brought, quod nota. Br. Damages, pl. 154. cites 37 H. 6. 38.

12. *But in annuity*, a man shall recover the annuity and the arrears pending the writ, and his damages over and above, quod vide in a note. Ibid.

13. *Trespas by tenant by statute staple*, the jury assessed damages as well for the time after the teste of the writ till the verdict, as for the trespas before the writ, and yet well, and the plaintiff shall recover, and upon the extent of the statute staple the sheriff return the extent of the land, and not of the goods. Br. Trespas, pl. 438. cites 16 H. 7. 6.

14. In *assise* it was found for the plaintiff, and they were adjourned to Westminster for difficulty of the verdict, and there it was adjudged for the plaintiff, and he recovered seisin of the land and damages, and damages for the adjournment, quod nota for the one and for the other. Br. Damages, pl. 112. cites 35 Aff. 13. And another assise which was adjourned anno 36 Aff. 2. it was awarded that the plaintiff should recover seisin, &c. and his damages taxed, &c. the plaintiff prayed his damages pending the adjournment, Chelr. said, this you cannot have; for it was not another time enquired of the value of the land per ann. which is necessary in all cases of adjournment, quod nota. Br. Damages, pl. 112.

15. *Patria laboribus & expensis non debet fatigari*, 33 H. 6. 47. in an *assise for land*, the plaintiff recovers damages till the time of the verdict; in an *assise for rent*, till the time of the judgment. Pilfold's case, 10 Rep. 115. in *trespas or ejectment till the writ purchased*. The reason of the diversity is, an assise complains of a wrong which continues, and the other instances of a wrong done before the plaint, and not of a wrong which continues; for in an assise of rent it appears by the plaint to the judges, how much is

appear at the time of the judgment; in an assise of land it appears to the jurors only. Jenk. 6. pl. 9.

16. In *real actions*, as *assise* for lands where damages are recoverable, as appears by the principal case, damages *till the verdict* are recoverable, and for rent as it is said before, till the judgment in *personal actions*, for the wrong done before the action brought; the reason is, damages are the principal in personal actions, and the plaintiff has possession, and knows his damage, and the damage is the cause of his suit. In *waste* the plaintiff may easily see it, and six of the jurors ought to view it before the waste be found. In real actions, the principal is the freehold, which is deforced from him, and he cannot know his damages, but the jurors have the view of the land, and may take knowledge of it; and for *rent* the judges may discern, by computation of the time, how much rent is incurred upon consideration of the writ, and count and deed, as aforesaid, and therefore in this case he shall have judgment of the rent incurred after verdict, till the judgment; *sententia non fertur de non liquidis*. Jenk. 7. pl. 9.

Pillford's
case, 10
Rep. 126.

17. In action of *battery* the plaintiff recovered damages; afterwards part of the plaintiff's skull came out, by reason of the same battery; whereupon he brought a new action for further damages; but the recovery in the former action was held a good bar and judgment for the defendant. 1 Salk. 11. pl. 5. Trin. 13 W. 3. B. R. Fetter v. Beale.

Ld. Raym.
Rep. 339.
Pasch. 10
W. 3. S. C.
adjudged
accordingly
nisi. —
Ibid. 692.
Trin. 13

W. 3. S. C. moved again, but the plaintiff could not obtain judgment, the Court inclining strongly against him.

18. In *covenant for not repairing* good damages ought to be given; per Holt Ch. J. who said that it had been always practised so before him, and every body else that he ever knew, and that they always consider in these cases, *what it will cost to put the premises in repair, and give so much damages*, and the plaintiff ought in justice to apply the damages to the repair of the premises, to which, &c. the Court agreed. 2 Ld. Raym. Rep. 1125, 1126. Pasch. 4 Ann. B. R. Vivian v. Champion.

19. An action was brought by the husband for taking his wife away, and ravishing her, *per quod consortium*, &c. *per magnum tempus*, viz. *per spatium unius anni amisit*, &c. Verdict pro quer. and general damages given. Moved in arrest of judgment, that a year had not expired from the first of October, the time of the offence, to the time of the verdict, and much less at the time of the action commenced; and therefore general damages being given, it was erroneous. On the other side it was said, that coming under a *per quod*, it was only consequential, and laid by way of aggravation of damages, and was not the cause of action; that the *per magnum tempus* was enough, and the viz. *spatium*, &c. should be rejected as surplusage, because impossible. Parker Ch. J. said this case was widely different from the common cases of viz. a time that is altogether impossible, as the 30th of February, &c. for here the whole time is not impossible; and it cannot be known for how much

much of it the jury gave the damages; most probably to the time of the verdict. Adjournatur. 10 Mod. 273, 274. Hill. 1 Geo. 1. B. R. Walter v. Warren.

* (1) *In what Cases the Court may assess Damages.*
[Without awarding a Writ of Enquiry.]

Br. Damages, pl. 56. cites S. C.

[1. **I**n a recordari for taking his cattle, if upon demurrer it is adjudged for the plaintiff, the Court may award damages without a writ of enquiry of damages. 14 H. 4. 9. b.]

[2. So for other things. 3 H. 6. 29. b.]

Br. Damages, pl. 68. cites 8 H. 6. 4. 5. S. C. per

[3. When a man shall be condemned by judgment, the Justices may tax the damages, without awarding a writ of inquiry of damages. 8 H. 6. 5.]

Martin. Though the Justices use to award inquest of damages when they give judgment by default, yet they themselves may tax the damages if they will.

Fitzh. Barre, pl. 283. cites S. C.

[4. In an audita querela, if the matter be found for the plaintiff by verdict, and they do not inquire of the damages, the Court may refuse to tax the damages; but they may award a venire to the same inquest to tax them. 22 E. 3. 5.]

5. In premunire by the King and J. N. against B. who confessed the action, and the plaintiff recovered damages as he counted, and therefore it seems that it was brought by J. N. qui tam pro rege quam, &c. and the Court would not tax the damages. Br. Damages, pl. 65. cites 21 E. 3. 4.

Br. Mesne, pl. 7. cites S. C.

6. The defendant pleaded release of acquittal, which was not sufficient, and therefore the plaintiff recovered his acquittal by award of the Court, and his damages taxed by the Court to 100s. And so see that in some cases the Court may tax damages without awarding writ of inquiry of damages. Br. Damages, pl. 59. cites 38 E. 3. 10.

7. Trespass of battery by which the party is maimed, the justices may tax the damages themselves by their discretion if they will, quod nota; per Cur. but yet they awarded writ of inquiry of damages. Br. Damages, pl. 54. cites 11 H. 4. 65.

8. In replevin, the defendant justified, the plaintiff pleaded jointenancy in the land, and had day in the same term, and at the day the defendant made default and the plaintiff recovered damages to 4l. taxed by the Court, and not damages as he counted, quod nota, that the Court itself taxed the damages. Br. Damages, pl. 55. cites 14 H. 4. 2.

9. Upon demurrer in law the Justices may award damages for the party by their discretion, or award writ to inquire of the damages at their election. Br. Damages, pl. 194. cites 14 H. 4. 39, 40.

10. In a replevin against O. who avowed for rent; the plaintiff was nonsuit; the question was, whether the Court might assess damages, without a writ of inquiry of damages? It was the opinion

that they might; for they are not in respect of any local matter, but they accrue to the avowant for the delay in the non-payment of the rent; *contrary where judgment is given for the plaintiff*; there the Court shall not assess the damages; for he ought to recover for the taking of his cattle, of which the Judges cannot take notice; and the damages may be greater or less, according to the value of the cattle, and the circumstances of the taking and delaying of them. 3 Le. 213. pl. 281. Pasch. 30 Eliz. C. B. Ognell's case.

11. The constant course and practice of both Courts is, on a [271] judgment in debt upon default or confession, to tax the costs occasione detentionis debiti, as well as costs of suit; and this being the assent of the party plaintiff, which is always entered on the record, as it is in this very case, will conclude the defendant, as appears by all the precedents in the books of entries; but if the plaintiff will not assent to it, then he shall have a writ of inquiry of damages occasione detentionis debiti if he will; but it is in the election of the plaintiff, and not of the defendant; and if the Court by the assent of the plaintiff may tax 20s. or any other small sum for damages occasione detentionis debiti illius, by the same reason they may tax 20l. or any greater sum for such damages, if they see cause. 2 Saund. 107. Trin. 21 Car. 2. Holdipp v. Otway.

12. In debt upon an obligation, the plaintiff had judgment, and afterwards brought debt on the judgment, and had judgment upon it. The Ch. Justice at first opposed the taxing damages, (viz. interest) without writ of inquiry; but afterwards it was referred to the secondary to tax the damages without writ of inquiry. Sid. 442. pl. 15. Hill. 21 and 22 Car. 2. B. R. Row v. Apsley.

(K) In what Cases the Court may mitigate or encrease Damages.

[1. DAMAGES are given at the nisi prius in an action where damages are the principal, and the Court cannot have any certain consuance of the cause, neither by the record, nor other matter apparent, they cannot mitigate nor encrease.] Fol. 572.

[2. [As] in case for slander, the defendant justified in the manner, and at the nisi prius damages were given, the Court cannot mitigate them. D. 2. Ma. 105. 15.] D. 105. 2. pl. 15; Mich. 1 & 2 P. & M. Bondham

v. Ld. Starston, S. C. adjudged. Palm. 314. Mich. 20 Jac. B. R. Hawkins v. Sciety, P. P. Jenk. 68. pl. 29. that the Court can neither increase nor abridge them.

[3. But in battery pro amputatione manus dextrae, the Court may encrease the damages, for it is apparent to the Court by the record and view of the person. D. 2. Ma. 105. 15. Tripeoney, 22 E. 3. 11. b. adjudged.] Fitch, Damages, pl. 105. cited 3. C.

S. C. cited [4. *So in battery upon view of mayhem in court.* 39 E. 3. 20.
Le. 139 pl. b. adjudged.]

191. Hill.
30 Eliz.

C. B. in case of Mallet v. Ferrera, where in trespass of battery the parties were at issue upon not guilty, and at the nisi prius it appeared that the thumb of the right hand of the plaintiff was clear cut off, and so maimed; and it was found for the plaintiff, and damages taxed to 40*l.* and now the party came in person into court, and prayed in respect of the heinousness of the maim, that the Court would increase the damages; which damages, upon great consideration had, were made 100*l.* and judgment given accordingly.

Br. Cofts, [5. *So in battery upon view of the wound in court.* 3 H. 4. 4.]
pl. 7. cites

S. C. — Br. Damages, pl. 47. cites S. C. — Br. N. C. pl. 466. cites S. C. — Fitzh. Damages, pl. 64. cites S. C. — S. C. cited Lat. 223. Mich 3 Car. in case of Hopper v. Pope, which was trespass of assault, battery and wounding, and upon not guilty, verdict was for the plaintiff, and small damages given; and because the plaintiff had a mayhem in his hand by the wounding, it was moved to increase the damages on view of the mayhem; but the Court ordered, that the wound be viewed by a chirurgion, and he to make oath that it is a mayhem, and also to have a certificate * of the Justice of assise, before the Court was tried that it is the same wound, upon which the action was brought, which was done, whereupon it was moved, that damages should not be increased, because the action is no more generally than for assault, battery and wounding, and a particular mayhem does not appear on the declaration, nor is it indorsed on the postea, nor is it according to D. 105. [See pl. 2. supra.] 22 E. 3. 21. [See pl. 3. supra.] 8 H. 4. 22. [See pl. 6. infra.] But notwithstanding, the Court increased the damages upon the matter above.

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† Fitzh. Damages, pl. [6. *So in an appeal of mayhem, upon view of the mayhem.* †
57. cites 8 H. 4. 22. † 30 Ass. 31.]

8 H. 4. 23.

S. C. — Br. Damages, pl. 47. cites S. C.

† Br. Damages, pl. 111. 30 Ass. pl. 30. [and Roll is misprinted.]

[7. Mich. 14 Jac. B. R. *In an appeal of mayhem, by Freeman against Trevers, the jury gave twenty marks damages, and upon view in court, and information of the surgeons there present, the Court encreased the damages to 100*l.* because he lost the use of his hand.*]

Br. Damages, pl. [8. *But if in an appeal of mayhem, the Justices of nisi prius, upon view thereof, certify, that he had sustained damages to such greater sum, yet the Justices of the court out of which it issues, cannot encrease damages without their view.* 8 H. 4. 23.]
47. cites
S. C. —
Fitzh. Damages, pl.

57. cites S. C.

Br. Damages, pl. [9. *But upon a view in pais by any of the Justices of the court into which the nisi prius is returned, they may encrease damages.* 8 H. 4. 23.]
47. cites
S. C. —

Fitzh. Damages, pl. 57. cites S. C.

Br. Abridgment, nl. 6. [10. *In conspiracy for indicting for a trespass, damages may be mitigated by the Court.* 7 H. 4. 31. b. Curia.]
cites S. C. —

Br. Damages, pl. 44. cites S. C. & S. P. and says, it is said there, that they may increase damages also. — But P. 27. H. 8. 2. per Englefield, Fitzherbert and Shelly. *In trespass local they cannot abridge nor increase damages contra of costs, and therefore it seems, that they cannot abridge nor increase, but in such cases where they may have notice as above, or in case of mayhem apparent and the like.* Ibid. — Br. Conspiracy, pl. 11. cites S. C. & S. P.

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[11. In *debt upon an obligation*, the defendant *denies the deed*, and it is *found against him*, the Court may encrease the damages assessed. 14 H. 4. 19. b.]

Br. Abridg-
ment, pl.
35. cites
S. C.—

Jenk. 68. pl. 29. cites S. C.

[12. In *trespafs for entering into his park, and taking a doe*, the Court may mitigate the damages given by the jury. 9 H. 6. 2. b.]

Fitzh. Judg-
ment, pl. 10.
cites S. C.—
Jenk. 68.

S. C.—2 Infl. 200. Ld. Coke says, that the words in the stat. Westm. 1. cap. 20. that "Great and large amends shall be awarded according to the trespass against trespassors in parks" attained at the suit of the party, "if the damages are too small, the Court has power to increase them; for the word (award) properly belongs to the Court.

pl. 29. cit 8

[13. In *trespafs for cutting his trees*, upon not guilty pleaded, the Court cannot encrease the damages given by the jury, because it lies not in their conscience. 3 H. 4. 4.

Br. Cofts,
pl. 7. cites
S. C.—

Br. Da-
mages, pl.

40. cites S. C.—Fitzh. Damages, pl. 54. cites S. C.—Jenk. 68. pl. 29. cites S. C.

[14. The law is the same in *trespafs for taking his goods*. 19 H. 6. 10. b.]

Jenk. 68 pl.
29. cites
S. C.

[15. In an *appeal of robbery*, if the defendant be acquitted, and it is enquired of the damages, and it is found to 20s. the Court cannot encrease the damages, because they know [or by reason of their knowing that] the appellee was long in prison, when the inquest had taxed the damages before. 42 Aff. 19.]

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Because it
is the de-
fault of the
Court that
the inquest
had not

been taken sooner. Br. Damages, pl. 115. cites S. C.—S. C. & S. P. per Knivet, and also because it was taxed by the inquest. Br. Abridgment, pl. 30. cites S. C.

[16. In such *action where the principal demand is certain*, the Court may encrease damages. 10 H. 6. 24. b. Curia.]

Br. Cofts,
pl. 28. cites
S. C.—

Fitz. Damages, pl. 31. cites S. C.

[17. As in *debt upon the arrearages of an account*, if the jury finds it arrear, and gives damages, yet the Court may encrease it, because the demand is certain. 10 H. 6. 24. b. adjudged.]

Br. Cofts,
pl. 28. cites
S. C.—

So in debt
against 1400

by several *præcipes*, upon an obligation, the plaintiff had several judgments, and damages severally, viz. against each the sum which the jury found, and the Court increased the damages over and above the verdict to a mark; quod nota; but it is said elsewhere, that he shall have but one execution. Br. Damages, pl. 57. cites 14 H. 4. 19.

[18. The Court may *abridge costs of suit* by the jury. 19 H. 6. 42. b. 43.]

Br. Abridg-
ment, pl. 8.
cites 19 H. 6.

42. S. C.—Fitzh. Damages, pl. 26. cites S. C.

19. Appeal of *mayhem*, the inquest taxed damages to 100s. and *Chelrington* increased them to 10 marks; and Wilby said, that it was too little, by which *Shard* awarded the damages to 10l. notwithstanding the first judgment. Br. Damages, pl. 111. cites 30 Aff. 30.

20. *Trespafs* for that the defendant beat and mayhemed him; the defendant pleaded not guilty, and is found guilty at the nisi prius,

pius, where the plaintiff gave in evidence, that he was mayhemed at the same time, and the inquest found accordingly, and damages 18l. and at the day in bank he shewed the maym to the Court, and prayed increase of damages, and the Court awarded, that he recover the 18l. taxed by the jury, and 22l. over, viz. 40l. in all. Br. Damages, pl. 86. cites 39 E. 3. 25.

21. *Trespass of trees cut*; issue was joined, and passed for the plaintiff to the damage of 5l. The plaintiff prayed, that they would increase damages. Thirn. said, we will not increase damages of trees cut; for it does not lie in our consuance, by which they increased costs, and not damages, quod nota. * This is intended of such matter which lies not in their consuance, but of such matters which lies in their consuance, they may increase after verdict upon issue, and so it was agreed by the prothonotaries of C. B. Hill. 3 M. 1. in trespass of battery. Br. tit. Abridgment, pl. 36. cites 3 H. 4. 4.

* See pl. 98. infra.

22. In *attaint*, the costs were increased by the Court. See Br. Attaint, pl. 26. cites 8 H. 4. 23.

23. The Court cannot increase damages after issue tried between the parties. Br. Abridgment, pl. 25. cites 8 H. 4. 23.

24. The Court adjudged damages by the view of the person, who was beaten, to 200 marks, which was adjudged by inspection. Br. Damages, pl. 49. cites 9 H. 4. 1.

25. In *replevin* the issue was found for the plaintiff to the damage of 20l. The plaintiff prayed his judgment, and the Court would not give judgment, unless the plaintiff would release part of his damages, and it was said, that by the same law that they may increase damages, they may abridge. Quod nota. Br. Judges, pl. 22. cites 11 H. 4. 10.

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26. Debt against A. upon an obligation, the defendant pleaded *non est factum*, and it was found against him to the damage of three marks. The plaintiff demanded judgment as the inquest had found, and increase of damages at their discretion, by which it was awarded, that he recover accordingly, and one mark over of increase. Br. tit. Abridgment, pl. 35. cites 14 H. 4. 19.

Br. Abridg.

ment, pl. 7.

cites 19 H.

6. 10. S. C.

27. Upon inquest of office to inquire of damages, the Court may abridge or increase the damages. Br. Damages, pl. 144. cites *

* It should be 19 H. 6. 10.

28. *But contra*, upon issue tried upon the principal between party and party, quod nota diversity. Ibid. and cites 7 H. 4. 31. 3 H. 4. 4. and 34 H. 8.

29. Note per Cur. that where the demand is certain, as in action of debt, &c. the Court may increase as well the damages as the costs, quod nota. Br. Damages, pl. 137. cites 10 H. 6. 42. 23.

30. And if the jury in debt finds 20s. for costs and damages in one and the same sum, the Court may increase it to 20s. more, quod nota. Ibid.

31. *Forcible entry* found for the plaintiff to the damage of 20l. and it was awarded, that he should recover 20l. taxed by the inquest.

quest, and 40l. over by the statute, viz. 60l. in all, and so see that the Court trebled the damages. Br. Damages, pl. 70. cites 19 H. 6. 6.

3. In *trespass*, the defendant imparled till another term, and at the a. made default, by which writ was awarded to enquire of damages, which found 20l. damages, and 4l. costs, and therefore the Court abridged the damages to 20 marks, and the costs to four marks; for where it is upon writ of inquiry of damages, the justices may increase or diminish at their pleasure; for it is only an inquest of office to instruct them, and they may assise the damages themselves, without awarding any inquest of office, or writ to inquire of the damages, if they will. Br. tit. Abridgment, pl. 7. cites 19 H. 6. 10.

33. But where the inquest passes upon the principal, viz. upon the issue between party and party, there the Court may increase costs, but not increase nor diminish damages; for there the party is at his attain, but upon inquest of office, he cannot have attain, quod nota differentiam, but where they give excessive damages upon the issue, there the Court may cease judgment, till the plaintiff will release the damages to a reasonable sum, quod nota. Br. tit. Abridgment, pl. 7. cites 19 H. 6. 10.

34. In *trespass* by two against three the one appeared and pleaded to issue, and the others made default, and at the day of nisi prius it was found for the plaintiff to the damage of 100l. which they severed, scilicet, 40l. for the value of the goods, and 60l. for the costs of the suit; the plaintiff prayed judgment and the Court thought the costs too high; and per Cur. if it was not for the two who made default the costs should be abridged; for they may as well abridge as increase costs, but by reason of the two in the simul the Court was in doubt; for in *trespass* against two, if the one appears, the plaintiff shall count, that he together with the other, did the trespass, and though against the one the process is deter mined, yet against the other process shall be awarded, and they could not know to what costs this may come. And after all was discontinued. Br. tit. Abridgment, pl. 9. cites 21 H. 6. 10.

35. In debt, the jury found the debt and damages to 26s. 8d. and the Court increased the damages to 13s. 4d. beyond the first sum. Br. Damages, pl. 139. cites 32 H. 6. 1.

36. Damages were increased in costs by reason that the defendant delayed the plaintiff by injunction. Br. Damages, pl. 165. cites 21 E. 4. 78.

37. In *trespass* local they cannot abridge nor increase the damages; contrary of the costs; per Fitzherbert, Englefield, and Shelley. And therefore after demurrer when the inquest and damages were awarded and returned, the Justices at the prayer of the defendant and his counsel would not abridge damages, quod nota. Br. tit. Abridgment, pl. 1. cites 27 H. 8. 2. [275]

38. Note, it was holden for law, that the Justices may increase but not decrease damages, because the party may have an attain. But note, contrary by Anderson and Periam. J. Godb. 135. pl. 157. Hill. 29 Eliz. C. B. Anon.

Damages.

39. In an *assault, battery, and wounding*, the plaintiff after verdict moved the Court for an increase of damages; the Court said they could not do it, if the word *maihemavit* was not in the declaration. Vent. 327. Hill. 29 & 30 Eliz. B. R. Anon.

Noy. 61.
S. C. &
quasi in to-
tidem ver-
bis.

40. The plaintiff declares in *debt upon obligation of 16l. to his damage of 10l.* and upon *non est factum* pleaded, the jury found the damages to 7l. and 40s. costs; and the Court increased the costs 4l. So he had judgment to recover his debt, and damages, and costs to 13l. which is more, than in his count, and this was assigned for error. Sed non allocatur. For *although the jury cannot give more damages than the plaintiff counts, yet the Court may increase them as they please*; wherefore the judgment was affirmed. Cro. E. 544. pl. 13. Hill. 39 Eliz. B. R. Wolf v. Meggs.

41. *Trespass of battery*; one of the defendants pleaded not guilty; the other justified. The issue against him was, *de son tort demejne*, and one *ven. fac.* was awarded to try these issues; and it was found for the plaintiff, and judgment accordingly, and error thereof brought, because the plaintiff declared to his damage of 40l, and the damages assessed by the jury were 35l. and the costs increased by the Court were 6l. So the plaintiff had judgment to recover 41l. which is more than whereof he declares; sed non allocatur; for the damages found by the jury being less than he counts, although the costs amount to more it is not material. Cro. E. 866. pl. 47. Mich. 43 & 44 Eliz. in Cam. Scacc. Comb. v. Carew.

42. *Trespass for breaking his close, and cropping 200 pear-trees, and 100 apple-trees*, upon not guilty pleaded, the plaintiff had a verdict and damages to 40l. The defendant moved the Court to mitigate the damages, it appearing upon affidavit that the plaintiff would have accepted 5l. before the action brought; but the Court said that they could not diminish the damages in trespass, which is local, and therefore it could not appear to them, and judgment accordingly. Brownl. 204. Mich. 3 Jac. Delves v. Wyer.

43. In trespass for an *assault and battery A. and B. A. appeared, &c. and a verdict was given against him*; the other was in the *simul cum*; and damages taxed against A. to 30l. but the Court upon view of the mayhem increased the damages to 40l, and afterwards a verdict was given against B. and damages taxed; and then it was moved, that the Court upon another view of the wound would increase damages against B. for that A. had murdered the officer that came to serve the execution upon him for the 40l. so that possibly the plaintiff might recover nothing against A. But it was denied by the Court, for that they could have the view but once in the same action, but if he had brought several actions, it would have been otherwise. But the Court directed the plaintiff to stay till A. was hanged, and then they might make the view and increase the damages. Litt. Rep. 51, 52. Mich. 3 Car. C. B. Anon.

Hill. 93. S.
C. accord-
ingly.

44. In *battery*, judgment was given upon *non sum informatus*, and afterwards there was a writ of inquiry of damages; on a motion

motion to mitigate the damages the Court said, that in such cases they never would alter the damages, where the party had also given evidence at the inquiry of damages. Lit. Rep. 150. Pasch. 4 Car. C. B. Stanlie's case.

*45. In *trespass pedibus ambulando* 10l. damages were given. Hett. 93. Cited by Crooke J. as a case in B. R. in which himself was S. C. cited by Crooke. counsel, and that he could never have any mitigation by the Court. Lit. Rep. 150. in Stanley's case. Pasch. 4 Car.

46. In *trespass* the plaintiff declared generally, that the defendant *maihemavit*, &c. And upon issue he gave in evidence that the defendant discharged a great gun in a ship without giving notice according to custom, &c. whereby the plaintiff lost an eye and a leg. It appeared upon the evidence, that it was done without any design or intention of the defendant, and therefore the jury gave but 10l. damages; whereupon the Court was moved to increase the damages upon view of the maihem, (as they might) and a day was given him to produce his witnesses, but their evidence being the same in effect as at the trial, the Court would not increase them; besides the particulars of the maihem being not set forth in this declaration, but generally *quod maihemavit*, the Court said that they cannot increase the damages upon view of the maihem unless the judges of the *nisi prius*, &c. before whom it was tried, certify the particulars of the maihem to the Court, and that these were the maihems, which the plaintiff offered to prove upon the evidence at the trial; for otherwise it cannot appear to the Court, that they are the same maihems for which the plaintiff had declared. Sid. 108. pl. 22. Hill. 14 & 15 Car. 2 B. R. Angel v. Shatterton.

47. In *trespass* for assault, battery and maihem, the jury gave only 10l. damages; but the Court upon view of the maihem, (which was a broken leg) and upon affidavit of the charges to the surgeon, increased the damages to 20l. *nisi causa*, &c. and now cause was shewn (viz.) that the plaintiff did not set forth in what part of his body he was maimed. But per Hale Ch. B. if the plaintiff alleges that he was maimed, that is ground enough; and afterwards it was held by Hale & tot. Cur. the damages may be increased where the word *maihemavit* is in the declaration; but the usual and better way had been to express the manner of the maihem and that in an action of battery the Court might increase the damages upon the view, if the manner of the battery was alleged in the count. Hardr. 408. Pasch. 17 Car. 2. in the Exchequer. Austin v. Hilliards.

48. The plaintiffs in an action of battery declared that the defendant struck the horse whereon the wife rode, so that the horse ran away with her, whereby she was thrown down, and another horse ran over her, whereby she lost the use of two of her fingers. The jury had given them 48l. damages, and they moved the Court, upon view of the maihem, to increase them; whereupon the declaration was read; but the Court thought the damages given by the jury sufficient. Mod. 24. pl. 65. Mich. 21 Car. 2. B. R. Dodwell and Ux. v. Burford. Sid. 433. pl. 26. Burford v. Dadwell S. C. mentions 8l. damages, and says the Court would not hear what the chirurgeons might say, because

it was doubted, whether it might be increased upon the view, in as much as there is not any maihem or wounding here directly made by the party, but that it is rather by accident, viz. the coming

coming of the other horse, and how he came, and whether the same might have avoided him in matter of evidence, and so they denied to increase the damages.

49. Collaterall damages shall be considered in equity on penalty of a bond to save barmies. Sid. 442. Hill. 21 & 22 Car. 2. B. R. King v. Atkins.

50. M. brought an action of *assault and battery*, against J. S. who pleaded, *de son assault demeins*; and a verdict being for the plaintiff, they gave him 6l. damages at the assises; but upon view of the mayhem, it appearing that he had lost two of his fingers, and was thereby disabled to follow his trade of cloth-shearing, the Court increased the damages to 100l. Freem. Rep. 173. pl. 185. Mich. 1674. C. B. More's case.

[277] 51. Adjudged in an action of *assault*, &c. that where the plaintiff declares of a wounding by the word *maibemavit*, it is clear the damages may be increased, though damages are given by the jury. 3 Salk. 115. pl. 6. Cook v. Beale.

52. So it is where the plaintiff sets forth a wound so particular in his declaration, that by the description it appears to be a *maibem*; and so it is where the wound is visible and apparent; and this may be done, whether damages are given by the jury upon an issue joined, or upon a writ of inquiry. 3 Salk. 115. pl. 7. Cook v. Beale.

Ld. Raym. Rep. 176. Hill. 8 & 9 W. 3. S. C. & S. P. resolved accordingly, though the word *maibemavit* is not in the declaration, and cites Rast. Appeal 46. and 8 H. 4. 31. b.

53. But this increase of damages must be given by the courts at Westminster upon the view of the wounding, or upon affidavits made thereof; and it cannot be done by the justices of nisi prius, who, if the wound is very great, must endorse the evidence on the *posse*, and upon such evidence the damages will be increased, though the wound was not set forth in the *maibemavit* in the declaration. 3 Salk. 115. S. C.

Ld. Raym. Rep. 177. Hill. 8 & 9 W. 3. S. C. & S. P. resolved, and cites 39 E. 3. 20. b. 128 E. 3. 11. Sty. 3. 4. and Hardr. 408.

54. And so it is without such indorsement, where the cause was tried before a judge of that court, where the motion is made for increase of damages. 3 Salk. 115. pl. 8. Cook v. Beale.

Ld. Raym. Rep. 177. S. C. & S. P. Per Powell J. and the reporter adds a note, that this cause was tried before Powell himself.

55. *Trespass, assault and battery*. The plaintiff declares, that the defendant cum manu sua ipsum Thomam Cook super *kniftrum oculum percussit et violavit ita quod*, the said Thomas Cook, viz. the plaintiff, *penitus inhabilis devenit ad scribendum vel legendum*, being an officer of the excise, &c. Not guilty pleaded. Verdict for the plaintiff. And Birch, serjeant, moved, that the Court would increase the damages, upon affidavit, that the plaintiff had lost his eye. But the Court ordered the plaintiff to appear in Court in person, for otherwise, they could not increase the damages; upon which the plaintiff was brought into court. And afterwards the Court, after several motions resolved, that the Court may

may increase the damages, if the wound be apparent, though it be not a maim. And so it was done in the case of the Lord Foliot. Therefore in this case, because the wound is visible, though it be no mayhem, (for it is not a mayhem, because the eye is not wholly out, but the plaintiff only declares, quod inhabilis ad legendum vel scribendum devenit by the wound,) yet damages may be increased. And Powell J. said, that Holt Ch. J. was of that opinion. *Ld. Raym. Rep. 176. Hill. 8 & 9 W. 3. Cook v. Beal.*

56. So (per Powell, J.) though the loss of a nose is not a mayhem to bring an action felonice for the loss of it, yet the Court may in such case increase the damages. *Ibid.*

57. And he said, that the Court might increase the damages upon a writ of inquiry, because that was but a bare inquest of office. And *Sty. 345. 1 Le. 139. Bend. 158. Litt. Rep. 51. Hutt. 121. 53. 1 Sid. 423. 1 Mod. 24.* were cited, and a case between SWALLEY AND BABINGTON, where in a general action of assault, battery, and wounding, upon view the damages were increased about four years ago, upon the motion of Serjeant Lovell. *Ld. Raym. Rep. 176. Hill. 8 & 9 W. 3. Cook v. Beal.*

58. The plaintiff was arrested at the suit of the now defendant, in a fictitious action, without any colour of reason; and afterwards he brought an action of false imprisonment against the defendant, and the jury gave him 8*l.* damages; and upon a motion in arrest of judgment, because the damages were excessive, it was opposed by the plaintiff's counsel, and insisted that he might have the benefit of the verdict, which was granted, and accordingly the plaintiff had judgment. *8 Mod. 296. Trin. 10 Geo. 1725. Herbert v. Morgan.* [278]

(L) [Mitigated, or Increased]
In Respect of the Plea;
[And Circumstances.]

[1. **I**N trespass for taking his goods, to the damage of 2*l.* if the defendant pleads an arbitrament made in another country, and this is tried against the defendant, and damages assessed for the trespass, yet inasmuch as this foreign jury could not have full conu-^{* See (N)} sance of the trespass, and the defendant hath not denied the damage to be according to the count, the Court, with the assent of the plaintiff, may increase the damages, and to so much as the plaintiff hath counted. *13 H. 4. 7. b.*]

[2. In an action for taking his goods, if the defendant avows, upon which it is demurred and adjudged for the plaintiff, or upon default and damage found upon the writ of inquiry of damages, the Court may increase them; for the Court (this being upon demurrer) might have awarded damages without inquiry, therefore the inquest is but for their information. *14 H. 4. 9. b. 3 H. 6. 29. b.*]

Fol. 578.

Br. Da-
mages, pl.
56. cites
S. C.

[2. So

[3. So in this case the Court may mitigate the damages for the same reason. 3 H. 6. 29. b.]

* Br. Damages, pl. 144. cites S. C. —

Br. Abridgment, pl. 7. cites S. C. for it is only an inquest of office to instruct the Court. —

Fitzh. Damages, pl. 24. cites S. C.

† Sty. 310.

Davis v. Ld.

Foliot,

seems to be

S. C. & S. P.

admitted, but says nothing of the manner of the assault, battery and wounding being laid in the declaration. — S. C. cited Ld. Raym. Rep. 176. per Cur.

4. So in trespass, if judgment be given upon *nil dicit*, and a writ of inquiry of damages served, the Court may increase or diminish the damages found by the inquest, for that they might have awarded damages according to their discretion, without such writ, * 19 H. 6. 10. b. adjudged, Mich. 1651. between † Ley and Lord Folliot, in an action of *assault, battery, and wounding, the manner of the doing thereof being specially laid in the declaration though the inquest gave 200l. damages, yet upon examination of surgeons, and upon view of the wound in Court, and for the benevolence of the fact*, being done in the High-street, in the day-time, with a stiletto, with an intent to kill him, and the surgeon, by agreement, being to have 150l. for the cure, the plaintiff being in great danger of death, and having lost a pottle of blood, as the surgeons said, the Court increased the damages to 400l. in toto, and judgment given accordingly.]

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5. In trespass for breaking his close by Rawlins with a continuando, it was moved by Coke, that the plaintiff needed not to shew a regrefs to have damages for the continuance of the first entry, viz. for the mean profits. Gawdy J. *without an entry, he shall not have damages for the continuance, unless in the case where the term, or estate, of the plaintiff in the land is determined*; and to such opinion of Gawdy, the whole Court did incline, but they did not resolve the point, because a regrefs was proved. Le. 302. pl. 416. Trin. 31 Eliz. B. R. Rawlins's case. Cites 20 H. 6. 15. 38 H. 6. 27.

3 Lev. 330.

Trin. 4 W.

& M. in

case of Hun-

lock v. Pe-

tre resolved

per tot. Cur.

that Littleton

and Coke are not to be understood of a simple plea of non-tenure, but of non-tenure with disclaimer, as the pleadings usually were in Littleton's time.

6. In such a *præcipe* where the demandant is to recover damages, if the tenant pleads *non-tenure*, or *disclaims*, there the demandant may aver him to be tenant of his land, as his writ supposeth for the benefit of his damages, which otherwise he should lose, or pray judgment and enter. Co. Litt. 362. b.

7. In trespass of *assault and wounding*, where the truth was, that the plaintiff's arm was broke, and he was in great danger still of losing the use of it, and the jury gave but 12d. damages; the Court would not increase them, because *the manner of wounding was not set forth in the declaration*; and, per Roll. Ch. J. it might be, that his arm was broke since the action, Sty. 345. Mich. 1652. Jervis v. Lucas.

(M) Damages Increased, or Decreased.
By what Court it may be.

[1. **T**HE justices of nisi prius have no power to encrease damages, but only to inquire of that which is affirmed by the inquest. 8 H. 4. 23.]

Br. Damages, pl. 47. cites S. C. —
Fitzh. Damage, pl. 57. cites S. C.

2. In trespass and battery in an inferior court, the judge there increased the damages upon view to more than was given by the jury. The Court said, that the proper way to reform this is by writ of error; for none but the courts at Westminster can increase damages upon view. Vent. 353. Hill. 32 & 33 Car. 2. B. R. Anon.

3. But a writ of error being brought, and error assigned, for that an inferior court had increased the damages given by the jury upon an inspection of the mayhem made by the said battery, the Court held, that the inferior court had power to judge upon their view of the mayhem, and to increase the damages, and affirmed the judgment. 2 Jo. 183. Mich. 33 Car. 2. B. R. Anon.

(M. 2) Damages tax'd by the first Inquest, [280]
where there are more Juries than one.

1. **I**N trespasss against two, if the one comes and pleads, and is convicted to the damage, &c. and the other comes and pleads, and is convicted, the 2d jury shall not give damages; for the 2d who pleaded shall be charged by the first verdict. Quod nota, Br. Damages, pl. 29. cites 44 E. 3. 7.

2. Forger of deeds, by which he was disturbed of his possession of such tenements in D. in the county of K. and of such lands in L. and alleged the forging at D. in the county of K. and brought the action in the county of K. and [as] to the land in the county of K. the defendant pleaded a plea to the issue, and to the land in L. other issue, and the jury of K. appeared and found for the plaintiff, and the jury of L. did not appear, therefore it was ordered, that the jury who appeared, should tax damages for the whole, and therefore the inquest assessed damages for the land in K. to 10l. and for costs, if he barred at L. to 100s. and for the forging, as to the teneiment in London 8l. and for costs of his suit, if it be found for him, 40s. over the 100s. and so damages and costs severed. Br. Damages, pl. 74. cites 21 H. 6. 51.

3. If two plead not guilty severally in trespasss, and several venire facias's are awarded, the inquest that first passed shall assess damages against all, and the second jury shall not assess the damages, and there the other defendant shall be charged of the damages, by the inquest

S. P. Br. Damages, pl. 98. cites S. C. So where several plead to

the issue in trespass, and after one makes default, yet the first inquest shall assess damages for all.—Br. Auaint, pl. 44. cites S. C.

inquest which passed upon the issue, to which he was not a party, but he was party to the original, quod nota, and therefore may have attaint also; per Moile, & non negatur, and in this case the second inquest shall not assess damages, quod nota. Br. Brief de enquire, pl. 8. cites 39 H. 6. 1.

4. After issue in trespass, the defendant confessed the action by which the same inquest enquired of the damages and no other. Br. Enquest, pl. 67. cites 18 E. 4. 7.

5. If an action of trespass be brought against two, and they plead several pleas, and afterwards one of them is found guilty by a several jury, that jury shall assess all the damages; and if the other be afterwards found guilty, he shall be subject to the said damages, although he was not party to the said jury; and by the same reason that he shall be charged with the same damages, by the same reason he shall have advantage of the satisfaction of them made by his companion, per Clench. 3 Le. 122. pl. 174. Trin. 27 Eliz. B. R. Anon.

6. In a writ of quare intrusit maritagio non satisfacto it was found for the plaintiff, but no damages were assessed by the jury, and the value of the marriage was found to be 500l. And now the question was, Whether the same might be supplied by a writ of enquiry of damages? and the Court prima facie, seemed to doubt of the case; for where the party may have an attaint, there no damages shall be assessed by the Court, if the same be not found by the jury; and therefore the Court would be advised of it; but afterwards in the same term it was adjudged, that no writ of enquiry of damages should issue; but a venire facias de novo was granted to try the issue again. Godb. 207. pl. 294. Mich. 1 Jac. in C. B. Cook's case.

[281] (N) For what Causes they shall be recovered.
Not for the Delay of the Court.

See [K] [1.] If a man appealed of robbery continues long in prison, and after is acquitted, he shall not have damages for the long continuance in prison, because it was a default of the justices that they did not deliver him at the first general delivery. 42 Ass. 19. per Knivet.]

Br. Audita Querela, pl. 3. cites S. C. but by Finch, the plaintiff shall not recover damages in this action, but where he is ousted of his land. — Br. Damages, pl. 25. cites S. C. — Fitzh. Audita Querela, pl. 3. cites S. C.

2. If the consuee of a statute merchant takes the body of the consueor in execution, without any extent of the land, after he hath released the statute, yet in an audita querela the consueor shall recover damages for the imprisonment of his body without cause. Quere, 47 E. 3. 1. b.]

(O) In what Actions Damages shall be saved by the Confessal.

[1. IN an admeasurement of dower, if the defendant comes the first day, and says, that he is ready to admeasure, the plaintiff shall not recover his damages. 42 E. 3. 19. b.]

Br. Admeasure-
ment, pl. 1. cites
S. C.—
Fitzh. Da-
mages, pl. 71. cites S. C.—2 Inst. 368. on the Stat. Westm. 2. 13 E. 1. cap. 7. 1st. Coke says, that in a writ of admeasure-
ment of dower the demandant shall recover damages if the tenant ap-
pears not the first day and yields to admeasure for the issues in the mean time, but in admea-
surement of pasture no damages shall be recovered at all, and cites S. C.—Fitzh. Damages, pl.
2. S. P. cites 34 E. 3.—Br. Damages, pl. 24. cites S. C.—Ibid. pl. 184. cites S. C. and 44
E. 3. 10, 11.

[2. In detinue, if the garnishment be prayed, and the garnishee comes, and cannot deny the conditions to be broke, the plaintiff shall not recover any damages against him. 8 H. 6. 11.]

[3. So if he maket default; for damages are given against the garnishee to delay. 8 A. 6. 11.]

[4. If a man will avoid the damages, because he hath been at all times ready to render the thing in demand, he ought to come at the first day 17 E. 3. 71.]

[5. In detinue for a writing against an executor, supposing it to come to his hands after the death of the testator, the defendant may come at the grand distress, and say, that he hath at all times been ready to deliver the writing after the time that it came to his hands, and thereby save damages against him. 22 Ed. 3. 9. b. adjudged.]

shall be recovered against him.

[6. In annuity, if the defendant be returned summoned, and does not come, but afterwards comes by attachment, he shall not save damages by saying, that he hath been at all times ready, for he shall not have such plea, inasmuch as he did not come upon the summons. 29 E. 3. 40. adjudged.]

has been at all times ready, &c. and yet the plaintiff recovered the annuity and the damages; quod nota. Br. Damages, pl. 186. cites 4 H. 4. 3.

7. In a writ of aiel, cosinage, &c. where the land and damages are to be recovered, the plea of tout temps pris is not good, because the tenant of the land there has no title, but holds the land by wrong. Co. Litt. 33. 2.

(O. 2) Saved. By Recouper.

1. THE lessor distrains his tenant for life, after that a term of rent was arrear, and continued seised, and the lessee recovered by the assise, and the rent which incurred during the seisin, by disseisin was recouped, and because a rent-day was arrear before

Br. Aff-
fise, pl. 141.
cites S. C.
and the
word (dis-
trains)

seems mis-
printed,
and that it
should be
(disseisin)
as it is in Br.
Assise, pl.
141.

before the disseisin, and another rent-day after the recovery by the assise upon this disseisin, therefore in assise of rent, brought by the lessor against the lessee after the recovery, is had by the lessee in the assise against the lessor, therefore the jury were compelled to sever their damages, and so they did. Quod nota. Br. Damages, pl. 94. cites 8 Ass. 37.

2. In assise of land, the defendant had *rent charge, or common, out of the same land* of which the assise is brought against him, and therefore the damages were recouped or abridged. Br. tit. Abridgment, pl. 26. cites 3 H. 6. fol. ult.

(P) *In what Actions Damages shall be recovered.*
[And Where.] Upon a Penal Statute. [Or otherwise.]

Cro. C. 559. pl. 3. North v. Wingate, S. C. adjudged that costs and damages are well given; and says, that so are all the precedents in Co. Ent. 163, 164. — Jo. 447. pl. 9. Musgrave v. North, S. C. and judgment in C. B. affirmed per tot. Cur. and cites Co. Ent. and said,

[1. **I**N an action of debt upon the stat. of 1 and 2 Ph. and Ma. for 5l. by the party grieved, for taking more than 4d. for a distress, by which act it is enacted, That if any takes more than 4d. for impounding a distress, he shall forfeit 5l. to the party grieved, over and above the sum that he took more than 4d. and it is found against the defendant, the plaintiff shall have damages, though it be upon a penal law, because *this is a debt of 5l. certain given by the statute, and not as damages, and the damages are to be given for the delay* in not rendering the debt upon the return of the summons, for this is not like to penal laws that give treble damages, for there it appears, that they intend it for damages, nor to the statute of 2 E. 6. where debt is given for the treble value, for that there the value is uncertain till the recovery; but here the 5l. is a certain debt by the statute, and it should be a small remedy for the party grieved to bring an action for 5l. without damages * or costs. Mich. 15 Car. B. R. between North and Musgrave, per Curiam, adjudged upon a writ of error upon such judgment in banco, where damages were given, by the direction of the Court, upon good advice. Intratur, Trin. 15 Car. Rot. 975.]

that though there are precedents there that no damages were given, yet this does not prove that they were not due. — Mar. 56. pl. 88. S. C. adjournatur. — Ibid. 61. pl. 95. S. C. Brampton and Jones conceived that the damages were well assessed upon the precedents cited, but Barkley doubted, and conceived upon Pilford's case, 10 Rep. that no costs should be given; and as to the precedents, he said that they did not bind him, for perhaps they passed sub silentio; et adjournatur.

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[2. Damages shall be given to the party grieved, in an action upon the statute of the 13 El. cap. 5. of forgery of false deeds. New Entries, 163.]

[3. Damages shall be given to the party grieved, in an action upon the statute of 21 H. 8. cap. 6. of mortuaries. New Entries 164.]

Mar. 58. pl. 88. S. C. says, Barkley J. asked Hoddef-

[4. If a common informer brings an information, or action of debt, tam quam, &c. upon a penal statute, for a sum certain given by the statute, he shall not recover his damages. M. 15 Car. B. R. in

R. in the said case of North and Musgrave, per Curiam, and the clerks agreed it to be the common course and practice.] don, if the informer should recover damages, and that he and Kneeling, clerk of the crown, said no; but said, that damages should be given against him.—See Tit. Actions (A. 8) and see costs [A. 4]

[5. In writs of execution, no damages shall be recovered. 50 Br. Damages, pl. 36. cites E. 3. 23. b.] S. C.—See the plea next following, and the notes, and see pl. 13. in the notes.

[6. In a *scire facias* no damages shall be recovered. 2 H. 6. Br. Damages, pl. 3. cites S. C. 15.]

—S. P. unless in special case, and in *scire facias* in nature of *quare impedit* between coparceners upon composition to present by turn, a man recovered the presentment and damages as admitted there. Br. Scire Facias, pl. 54. cites 50 E. 3. 28.—So upon the appearance of the party in *scire facias*, upon a fine levied of an acquittal in writ of *mesne* upon appearance of the defendant; contrary upon his default; per Belknappe. Br. Scire Facias, pl. 54. cites 50 E. 3. 23.—Br. Damages, pl. 36. cites S. C.—Lat. 101 in a nota. S. P. that no costs shall be, or ought to be in a *scire facias*; sic dictum fuit per omnes —

In *scire facias* against the heir of acquittal acknowledged by his father he was returned warned, and did not come, by which distringas issued and no judgment to recover the acquittal, and damages as it should have been against his father, if he had appeared and pleaded and it had been found against him. Br. Damages, pl. 175. cites 46 E. 3. 31.

In *scire facias* upon recovery of an annuity the plaintiff shall not recover damages nor arrears pending the *scire facias*, but he shall recover the arrears pending the writ of annuity, per judicium Curie. Br. Damages, pl. 145. cites 9 H. 5. 12. & 7 H. 4. 15. Per Rykhill J.

[7. In a *formedon* no damages shall be recovered. 3 H. 4. 15.] Br. Damages, pl. 187. cites S. C. that a man shall recover damages in attain founded upon a *formedon*, and yet he cannot recover damages in the *formedon* upon which it is founded; but it is founded upon the false oath; per Hill.

[8. In *detinue* damages shall be recovered. 2 H. 6. 15.]

[9. In an *attaint* of a freehold, damages shall be recovered at the common law. 3 H. 4. 15.] Fitzh. Damages, pl. 55. cites

S. C. that at common law a man might have *attaint* of frank-tenement and damages in the same writ, per Hill.—In *attaint* if the plaintiff recovers restitution of the thing lost, yet he shall recover damages besides. Br. Damages, pl. 174. cites 46 E. 2. 23.

[10. In a *warrantia chartæ*, if the plaintiff recovers *pro loco & tempore*, he shall not recover damages, and yet he counts of damages. 21 E. 3. 57. b. Quære 18 E. 3. 43. b.] See 18 E. 3. 42. b. pl. 47. where

S. P. is made a *quare*, but the reporter says, vide supra, where damages are recovered in *simili casu*.

[11. In a writ of *warrantia chartæ*, although the defendant delays him by issue, yet no damages shall be recovered where no land is lost. 42 E. 3. 7. 6. (It seems this is to recover *pro loco & tempore*.)] Br. Damages, pl. 183. cites S. C. but is, that a man shall recover damages in *warrantia chartæ*, where he did not lose the land.—Fitzh. Damages, pl. 69. cites S. C.—S. C. cited Hob. 23.

[12. But otherwise where the land is lost. 42 E. 3. 7. b.] Fol. 376.

Fitzh. Damages, pl. 69. cites S. C.

In a writ of mesne between Ld. [13. A man shall not recover damages in a writ of mesne, if it be brought for the acquittal before distress in his default.]

and tenants, the defendant acknowledged acquittal by fine, whereupon the plaintiff afterwards sued sci. fa. to say why he did not acquit him, and defendant made default, whereupon a distringas ad acquietandum issued, but not returned, then an alias issued and the sheriff returned issues, whereupon the plaintiff prayed a writ to inquire of damages, but could not have it; because in sci. fac. and writ judicial, a man shall not recover damages, but in an original writ: but at last they awarded another writ of distringas ad acquietandum, upon which if he comes and cannot excuse himself, he shall recover damages; per Belk. but not upon his default. Br. Damages, pl. 86. cites 30 E. 3. 23. — Br. Scire Facias, pl. 54. cites S. C. — In writ of mesne if he denies the deed of acquittal, and it is found against him, he shall recover his damages without inquiring whether he was distrained in his default; per Belknap. Fitzh. Damages, pl. 69. cites 42 E. 3. 7.

In writ of mesne if the defendant pleads, that not distrained in his default, there the plaintiff shall recover by his acquittal immediately, and damages when the issue is tried. Br. Damages, pl. 196. cites 13 E. 4. 6.

[14. The law is the same, though the defendant delays him by denying his deed. Contra, 42 E. 3. 7. b.]

* Fitzh. Damages, pl. 19. cites [15. * In a nuper obiit he shall not recover damages. 7 H. 6. 35. b. 21 E. 3. 57. b.]

Fitzh. 7 H. 6. 34. S. P. & S. C. — Br. Damages, pl. 66. cites S. C. — Ibid. between the pleas 38 & 39 is a note that in nuper obiit the demandant shall recover damages. 38 E. 3. 8. in a short note.

Br. Damages, pl. 66. cites S. C. [16. Nor in a perambulatione faciendā. H. 6. 35. b.]

* Fitzh. Damages, pl. 19. cites [17. Nor in a writ of account, for the auditors give a consideration for it, yet he counts of damages. † 7 H. 6. 35. b. 21 E. 3. 57. b. † 10 H. 6. 18. b.]

S. C. & S. P. by Martin, and says that the reason is because he is after adjudged to account, it may be that he shall not be found in arrears, and so the Court is not ascertained, whether he be damaged or not, besides it lies all in arrears and so in effect he shall recover damages there. — Br. Damages, pl. 66. cites S. C.

† Br. Damages, pl. 136. cites S. C. — Fitzh. Damages, pl. 30. cites S. C. adjudged per tot. Cur.

S. C. cited § Le. 118. [18. So no damages shall be recovered in an account as a receiver, &c. where the auditors give not any consideration for the profit thereof. 14 E. 3. Account 109. adjudged. 2 R. 2. Account 45.]

Hill. 30 Eliz. B. R. in case of Collet v. Robbison, where in account against a receiver of monies to render account quando ad hoc requisitus fuerit, damages were given in C. B. and this was assigned for error in B. R. and notwithstanding all objections to the contrary the judgment given before was affirmed. See pl. 28. and the notes.

[285] [19. In a writ of partition by one coparcener against the other no damages shall be recovered, though the defendant hath not been at all times ready to make partition. 21 E. 3. 57. b. adjudged, S. C. & S. P. contra * 7 H. 6. 35. b.]

agreed that he shall not recover damages, but Strange and Martin argued that it was unreasonable that he should recover damages, but the 3 E. 3. is e contra. — Fitzh. Damages, pl. 19. cites 7 H. 6. 34. b. S. C. accordingly. — The plaintiff shall not recover damages; for this is a writ of right in his nature, and she has a right per my & per tout to take the profits. a Inst. 289. — In such writ no damages shall be recovered nor an inquiry for them, and yet the writ and count is ad damnum, &c. Noy 68. per Cur. Warwick (Countess) v. Ld. Berkeley, and cites 3 E. 3. 47. Partition, 11.

[20. In

Damages.

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[20. In an *appeal of maihem* he cannot count of damages, and yet he shall recover damages. 10 H. 6. 18. b.] Br. Damages, pl. 136. cites

S. C.—Fitzh Damages, pl. 30. cites S. C. & S. P. by Babington.—Damages shall not be given for the defendant in appeal if he was indicted before, so that the appeal and the indictment agree in naming him principal or accessory. Br. Damages, pl. 18. cites 40 E. 3. 42.

[21. In an *audita querela* damages shall be recovered. 26 E. 3. 73. b. per Thorp.] Fitzh. Audita Querela, pl. 36. cites S. C.

[22. In an *audita querela* for *suing execution* upon a statute against his own release, Damages shall be recovered. 17 E. 3. 39. b.] In Audita Querela, the plaintiff shall recover damages
for execution sued against him wrongfully, if it be found, quod nota. Br. Damages, pl. 38. cites 2 H. 4. 17.

[23. In a writ of *deceit*, upon a recovery by default, by which the judgment shall be reversed, and the plaintiff restored to the mean issues, no damages shall be recovered. 18 E. 3. 28.]

[24. In a prohibition to the Ecclesiastical Court, for a matter triable at the common law, if the plaintiff declares upon a prohibition, and alleges, that the defendant hath prosecuted the suit in the Spiritual Court after the prohibition granted, and the defendant pleads thereto, and several issues are joined upon several customs, and one issue also joined, whether he prosecuted in the Court Christian after the prohibition granted, and at the nisi prius this issue is found for the plaintiff, viz. that the defendant had prosecuted there after the prohibition granted, the plaintiff shall have damages to be taxed by the jury, as well upon this declaration, as upon an attachment upon a prohibition. Mich. 15 Car. B. R. between Facy and Lang, adjudged per Curiam, and then was vouched a precedent in Banco, between Ball and Berry, Tr. 7 Car. where it was so resolved per Curiam, upon the view of many ancient precedents.] Jo. 447. pl. 11. S. C. adjudged.—Cro. C. 559. pl. 1. S. C. adjudged.—See tit. Costs (B) pl. 1. S. C. and the notes.

[25. [So] In a prohibition, *Quare secutus est in Curia Christianitatis de laico feodo*, as for tythe-hay of Black-Acre, where he had White-Acre in satisfaction of tythes time out of mind, &c. if this be found against the defendant, the plaintiff shall have damages. Co. Magna Charta. 490.]

[26. In a writ of *ward of the body and land*, damages shall be recovered. 27 E. 3. 79. b.] Fitzh. Gard, pl. 22. cites S. C.

[27. In a writ of *account*, as receiver to merchandize, he shall render damages for the profit that he had, or might have made of the money.] In account against a receiver or bailiff, damages are not recoverable, for it is founded upon a faith and trust, and is not brought for a wrong. Jenk. 288. pl. 22.

[28. [But] In writ of *account*, as receiver to deliver over to another, or to re-deliver, and not to merchandize, there no profit shall be given in nature of damages. 2 R. 2. Accompt 45.] [286] 3 Le. 290. pl. 311. Trin. 31.

Elia. B. R. Collet v. Robbison, cites S. C. and 2 H. 7. 13. and it was assigned for error, that the jury
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Jury had affixed damages, which ought not to be done in action of account; but the book of entries 22. was cited, where in a writ of account against one as receiver for to render account, damages were given by the jury for the plaintiff; and in the case of an account against one as bailiff, damages shall be given; for if my bailiff, by the employment of my monies, whereof he was receiver, might have procured profit and gain unto me, but he neglects the same, he shall be charged able to me to answer the same; and here in our case, damages shall be given ratione implicationis; and afterwards, notwithstanding the exceptions, the judgment was affirmed.

† Fitzh. Account, pl. 72. cites S. C.

[29. [So] In a writ of account, as receiver of 20l. if the defendant comes the first day, and is ready to account, and accounts, and is found in arrearages, yet he shall not pay any damages nor costs. Tr. 4 Ja. B. R. in a nota per Curiam. † 14 E. 3.]

[30. But if he pleads never his receiver, and after accounts, and is found in arrearages*, he shall render damages. Tr. 4 Ja. B. R. in a nota adjudged. 5 E. 3. 160. b.]

[31. [But] In an account as receiver (as it seems) if the defendant be adjudged to account, and he will not account, but lies in the Fleet for two or three years, and then the plaintiff prays his judgment according to what he has counted, and has it, yet he shall recover nothing of the profits, for the mean time he was in prison, and this proves, he shall not recover damages in an account. 14 E. 3. Accompts 109.]

32. West. 2. cap. 36. 13 E. 1. None shall procure any to distrain another to make him appear at the county court, or any other inferior court, on purpose to vex him and put him to charge and trouble, in pain to make fine to the King, and to pay to the party grieved, treble damages.

33. A man lost his land in court baron, and brought writ of false judgment and recovered, and his damages. Br. Damages, pl. 134. cites 20 E. 3. & Fitzh. Scire Facias 123.

34. In cessavit, the demandant shall recover damages upon the arrears and surety tendered after verdict, and before judgment. Br. Damages, pl. 147. cites 21 E. 3. 23.

* This was Trin. 21 E. 3. 28. a. pl. 26. — Fitzh. Trespafs, pl. 213. cites Trin. 21 E. 3. 28. but not so Aff. 3. which is not the S. P. and so Jenk. seems misprinted.

35. Trespafs is brought by A. against B. vi & armis & contra pacem, for the taking and detaining of charters; and he doth not shew in the count, what lands the charters concern; the defendant pleads not guilty; a verdict is found for the plaintiff. He has judgment for 100l. damages; it is affirmed in error, because that this action is trespafs, in which damages only are recoverable, and not the charters; and also because no exception was taken to the declaration before verdict. Jenk. 20. pl. 39. cites in Marg. * 21 E. 3. 28. and Fitzh. Trespafs, 213. 10 Aff. 3.

36. In ejectment of ward the proclamation was returned, and the plaintiff recovered the ward, and had writ to inquire of the damages, ubi per statutum non dantur in hujusmodi casu. Br. Ejectione, &c. pl. 6. cites 24 E. 3. 33.

37. In replevin the defendant avowed upon J. N. who came gratis, and joined to the plaintiff, for that he had leased to the plaintiff for years, which yet continues, and they disclaimed, and well, and the termor, who was plaintiff, recovered the damages only; for he

he was distrained, and was sole plaintiff, and *baa all the loss by the taking of his beasts*. Br. Damages, pl. 172. cites 45 E. 3. 7.

* 38. Though a man declares of damages in account, yet he *shall not recover damages in action of account, but in appeal of mayhem a man shall not count of damages, and yet he shall recover damages*. Br. Challenge, pl. 192. cites 10 H. 6. 18.

39. In *formedon of rent*, the demandant shall not recover arrears; for damages are not given in this action. Br. Damages, pl. 14. cites 33 H. 6. 47.

40. False imprisonment *for imprisoning the defendant till he made an obligation of 40l. by duress to the defendant and others ignotis*, and held good; if he does not know their names, he cannot shew their names; for the obligation is not the effect, but the imprisonment, and of this he shall recover damages, and not for the obligation; for he is not thereof yet damnified, and may plead duress when it is sued, but of *imprisonment, till he makes fine*, he shall recover damages for both then; for he is grieved by the fine presently; contra by obligation. Br. Faux Imprisonment, pl. 20. cites 2 E. 4. 19.

40. A man shall not recover damages for the issues and profits, *Disfrise in an action on the statute of 5 R. 2. but only for the entry; for the action is, quod ingressus est, ubi ingressus non datur per legem*, Br. Damages, pl. 120. cites 2 E. 4. 24.
 Disfrise may have an action upon stat. 5 R. 2. cap. 7. and he shall recover damages for the first tortious entry, but not for the mean profits in this action, though he made a regress; and here note, that also he shall recover his costs of suit, expensæ litis, which Litt. doth include within these words, (damages, &c.) Co. Lit. 257. a.

41. In *account*, the plaintiff shall count of damages, and yet *shall not recover damages*. Br. Damages, pl. 166. cites 2 H. 7. 13.
 Though the plaintiff shall not recover damages, yet

he shall recover a sum in gross for the increase. Br. Damages, pl. 178. cites 21 H. 6. 26.—Jenk. 388. pl. 22. S. P. ad finem.

42. In *warrantia chartæ, & curia claudenda*, the plaintiff shall recover the warranty, and the inclosure and damages. Br. Damages, pl. 118. cites 16 H. 7. 9, 10.

43. Note, that where *action penal* is given by *statute to recover a great sum by action of debt for ingrossing, &c.* there the *plaintiff shall not recover costs nor damages* in this action of debt. Br. Damages, pl. 200. cites 35 H. 8. and Trin. 4 M. 1.
 Br. Costs, pl. 32. cites 35 H. 8. S. P.—Br. N. C. pl. 258.

cites 35 H. 8. and Trin. 4 M. 1. S. P.—10 Rep. 116. b. cites Br. Damages, pl. 200.

44. *By the common law* a man could *not* recover damages in a *real action*. Br. Damages, pl. 143.
 S. P. per Cur. as in dower, he could not before the statute of Merton, nor in aiel, mortdancesor, &c. before the statute of Gloucester, 6 E. 1. cap. 2.—10 Rep. 116. a. in Pilfold's case.

45. *But in mixt and personal actions* he might, Br. Damages, pl. 143.
 S. P. per Cur. as to actions mixt, as in assise, entry in nature of assise, &c. Or in personal actions, as trespasss quare clausum fregit, of goods carried away, &c. 10 Rep. 116. a. in Pilfold's case.

Regularly in *personal and mixed actions* damages were to be recovered at the common law, but in *real actions* no damages were to be recovered at the common law, because the Court could not give the demandant that which he demanded not, and the demandant in real actions demanded no damages, neither by writ nor count; *judex non reddit plus quam quod petens ipse requirit*, and it is a maxim in law, *Que droit ne doit plus que soit demande*; and therefore in real actions, where damages are given by this act, viz. Statute of Gloucester, the demandant shall recover damages *pendente brevi*, because the old form of the count remains. The words of the act are, "against him who is found tenant." He may be tenant by title, by wrong, or by act in law. 2 Inst. 286.

[288] 46. In a writ of *reception*, damages shall be recovered for the second distress taken. F. N. B. 71. (E)

47. Upon a writ *de securitate pacis*, and the plaintiff shall recover damages. F. N. B. 80. (A)

But he shall not recover damages as for loss of a feignory or court; for the feignory remains, and the loss of the court is only *pro hac vice*. F. N. B. 98. (M) in the new notes there (f) cites 17 E. 3: 31. 37.

49. In forcible entry upon the *statute of 8 H. 6.* where one *entereth with force*, or where he *entereth peaceably and detaineth it with force*, or where he entereth by force, and detaineth it by force; without any regrest the plaintiff shall recover treble damages, as well for the mean occupation, as for the first, by force of the statute. Co. Litt. 257. b.

50. The plaintiff in *account* shall not recover damages, for the uncertainty of his demand; but Hales said, that the books are agreed, that if the *defendant pleads in discharge of the account* before the auditors, upon which they are at issue, and found for the plaintiff, in this case he shall recover damages; for they are at issue upon a collateral matter. Dal. 18. pl. 12. Anno 3 & 4 P. M. cites Trin. 14 E. 3. Fitzh. Account. 109. and Trin. 2 H. 7. 13.

Ow. 13, 14. Halsewood's case, S. C. adjudged, that no damages shall be had in such case; but for another error assigned the judgment was reversed.

51. Error of a judgment in replevin, where the defendant *avowed for an estray*, for that the *defendant had return awarded, with costs and damages*, whereas no costs are given by the statutes of 7 H. 8. or 21 H. 8. The Court doubted of it, but *conceived it was error*. Cro. E. 257. pl. 36. Mich. 33 & 34 Eliz. and 329. Trin. 36 Eliz. B. R. Haslip v. Chaplen.

52. In an action *against a rescuer, upon an alias capias* in B. R. the plaintiff declared of a debt due to him, &c. and had damages given him for his debt, because by this rescue he lost it, though the writ is only in nature of a plea of trespass, and though it was not shewn, that the resuer knew that the plaintiff would declare for this debt. But if in this case the sheriff, &c. had suffered a negligent escape, he should only be charged with the damages in the same plea, as the writ supposeth, and not for the debt. Lane 70, 71. Trin. 7 Jac. in Scacc. Kent v. Kelway.

53. In an *account* a man shall recover damages upon the second judgment.

judgment. Arg. said to be clear. --Mar. 99. in pl. 171. Trin. 17 Car. C. B.

54. In an action of debt for 200l. upon the statute 2 E. 6. for tithes of land in the parish of Ringston, alias, Royston, the defendant pleaded the statute 31 H. 8. and that the lands were discharged in the hands of the prior of Mount Bretton, at the time of the dissolution, and issue joined upon the discharge; and upon a trial at bar, the defendant not making good his plea, the Court ruled the value to be taken as confessed, because the issue is joined upon a collateral point. And the defendant took not the value by protestation, and so the verdict was given for 200l. but neither damages nor costs. All. 88. Mich. 24 Car. B. R. Bowles v. Broadhead.

55. Attachment upon a prohibition, and the plaintiff declared, that the defendant sued in the Ecclesiastical Court after a prohibition granted, for the profits of the Office of Register, to the Archdeacon of Huntingdon; judgment by default, and a writ of inquiry, and damages and costs taxed; it was objected, that damages, &c. could not be given in a prohibition; but judgment was given for the plaintiff, for the damages and costs. 3 Lev. 360. Pasch. 5 W. & M. in C. B. Heywood v. Foster.

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56. In case for rescuing a distress for rent, and not guilty pleaded, a verdict was for the plaintiff, whereupon he prayed his treble damages, on the statute 2 W. & M. sess. 1. cap. 5. But because he did not shew that the distress was appraised, nor conclude contra formam statuti, he could not recover them, and judgment accordingly. Ld. Raym. Rep. 342. Pasch. 10 W. 3. C. B. Anon.

57. Action brought in the court of C. B. upon several promises; judgment by default; writ of inquiry executed, and 424l. damages given. Error brought in the court of B. R. plaintiff in error did not proceed. The Court was moved upon 3 H. 7. cap. 10. that the defendant in error, should, besides the costs, have interest allowed him, for the sum adjudged due to him, pending the time of the writ of error, from the judgment. It was resolved by the whole Court, that the defendant upon a writ of error brought into B. R. should not have * interest allowed him by way of damages, for the sum adjudged due to him, from the time of the first judgment, pending the writ of error. For at the time of making the statute 3 H. 7. cap. 10. which gives the damages upon the writ of error, all interest was reputed unlawful; and therefore that statute could not give it. In fact, when interest run highest, as at 10 per cent. interest has not been allowed. In writs of error brought into the Exchequer Chamber, interest is never allowed; and a uniformity in practice to be wished and endeavoured. 10 Mod. 274. 278. Hill. 1 Geo. 1. B. R. Holroy v. Ebizon.

* See (.)
Faulshaw v.
Morrisson.

58. By the common law in every action of debt, damages are given occasione detentionis debiti, either by writ of inquiry, or by the Court. Per Parker Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

(P. 2) In what Actions nothing shall be recovered besides Damages. Or what more shall be recovered.

1. **I**N *recaption* a man shall recover damages only. Br. Recaption, pl. 3. cites 47 E. 3. 7.

2. In *rescous* nothing shall be recovered but damages. Br. Rescous, pl. 28. per Brooke.

3. An *assumpsit* gives only damages and costs, and varies from a judgment for *debt*, which gives the debt, damages and costs, where a debt is due. Jenk. 331. pl. 65. cites Cro. J. 544. 17 Jac. Heath v. Dauntley.

[290] (C) For what Things the Damages shall be said to be given.

Sid. 38. pl. 8.
S. P. in a
note there.

1. **I**F an action upon the *case* be brought for *speaking of words* all at one time, and upon not guilty pleaded, a *verdict* is given for the plaintiff; though some of the words will not maintain an action, if any of the words will maintain the action, the damages may be given intirely, for it shall be intended that the damages were given for the words which will maintain the action, and only increased for the other words, and that they are mentioned only for aggravation.]

[2. But if the action be brought for *several words spoke at several times*, and the action will not lie for the words spoke at one time, but will lie for the words spoke at another time, and upon not guilty pleaded, a verdict is found for all the words, and intire damages given, this is not good.]

[3. In an action upon the *case* for words spoke at one time, if the defendant pleads not guilty as to part of the words, which words will not maintain an action, and he justifies the other words, and the plaintiff replies *de son tort demesne*, without such cause, and a verdict is found for the plaintiff; in this case intire damages may be given, because now in part, by the confession of the party, and in part by the jury, it is found that he spoke the words as they are alleged in the declaration, scilicet, at one time, and then it shall be intended the damages were given for the words, which will maintain the action, and that the other words were but for aggravation. Tr. 17 Car. B. R. between Lambell and Hancock, per Curiam adjudged, this being moved in arrest of judgment after a verdict, and intire damages given for the plaintiff.]

All. 23, 24.
S. C. says it
was re-
solved, that
it shall not
be intended

[4. In an action upon the *statute of monopolies*, if the plaintiff declares, that the defendant, *colore cujusdam proclamationis*, &c. 7 Jan. 20 Car. procured the plaintiff to be taken and imprisoned, and to be detained in prison for twenty weeks next ensuing, and

certain

certain wines of the plaintiff, till be made a fine for the deliverance, and by colour aforesaid, after, scilicet, 14 Jul. 20 Car. supradict' tales & tantas minas de imprisonamento corporis querentis, ad tunc & ibidem ei intulerunt, quod querens per longum tempus, scilicet, a præd' 14 Julii, anno 20 supradict'o, usque diem impetrationis hujus billæ, scilicet, 14 Junii, anno 21 Caroli Regis, circa negotia sua necessaria palam intendere non aud:bat, and upon not guilty pleaded, a verdict is given for the plaintiff and intire damages. In this case the declaration is repugnant as to the menace of imprisonment, if it be interpreted according to the words, inasmuch as it is alleged before that he procured him to be imprisoned 7 Jan. 20 Car. and then it is said, that afterwards, scilicet, 14 Jul. 20 Car. he menaced, &c. which was before Jan. 20 Car. and after says, that he durst not go about his business, a præd' 14 Jul. 20 Car. till the bill exhibited, so in words repugnant, yet inasmuch as in law, when he alleges the day, and after says, that afterwards, scilicet, 14 Jul. 20 Car. this which comes after the scilicet, * being contrary to that before alleged, shall be void, and a void allegation, and then the reference thereof, as to not daring to go about his business, having reference to the said void allegation of the 14 July till the bill exhibited, is also void, and then by law it shall be taken as if no more had been alleged, but that he after menaced him, by which he durst not go about his business for a long time, which would be sufficient of itself without more, and then in this case it shall be taken and intended by the law, that the jury gave damages for that as it was alleged in law materially, and not as it is alleged under the scilicet, and so that they gave damages for menacing him, by which he durst not go about his business, and so the damages well assessed. Mich. 23 Car. B. R. between Sims and Gregory, adjudged for the plaintiff, after several motions in arrest of judgment. Intratur, Pasch. 23 Car. Rot. 274.]

in this case, that the jury have given damages with respect to the time brought in by the last scilicet, after per longum tempus, which overreaches the time that the threats were made, (the time brought in by the first

* Fol. 577.

scilicet being taken to be void) but that the time mentioned in both places being in judgment of law taken to be void, and as out of the declaration, it shall be taken to be out of the consideration of the plaintiff.

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jury in taxing the damages; and judgment was given for

[5. In an action upon the case upon a promise, if the plaintiff declares, that whereas the defendant was possessed of a shop in B. and of several goods and chattels in the said shop, in which shop the defendant ad tunc exercuit the art or mystery of a grocer, the defendant, in consideration the plaintiff would marry C. the daughter of the defendant, assumed and promised to pay so much money for her portion, and so much for apparel, and that she would transfer, Anglice, would turn over to the plaintiff negotiationem suam Anglice, her trade in B. præd', and the said shop of the defendant there, and so much of the goods and chattels of the defendant, in the said shop, which should be worth 10l. and that she would not, at any time after, exercise her said trade in B. aforesaid, and that she would lend to the plaintiff 10l. till a certain time, and assigns a breach in all; and among other things, that the non transiit, Anglice, did not turn over to the plaintiff negotiationem suam præd' in B. aforesaid, nor the shop præd'; and all found for the plaintiff, and intire damages given; and though it is impossible

All. 67. Pragnel v. Goffe, S. G. and judgment in C. B. affirmed in B. R. — Sty. 111. Pragnel v. Goffe, S. C. and the judgment affirmed. And Roll. J. said, that if damages intire are given, for some things with others, whereof some are impossible, the damages

shall be intended to be given for those that are possible, and void as to the rest.

to assign *suam negotiationem*, scilicet, her trade, yet it shall be intended, if it be void and impossible, and signifies nothing, and it is of no sense or meaning, *that the jury did not give any damages for it.* Trin. 24 Car. B. R. between Gosse and Pragnell, adjudged in a writ of error upon a judgment in Banco, and the judgment affirmed. Intratur, P. 24 Car. Rot. 217.]

Sty. 27.
Bruc v.
Southwell,
S. C. adj.
jornatur.—
Ibid. 58.
S. C. adjor-
natur. —
Ibid. 63.
S. C. ordered
to be argued
again on
both parts.

[6. In an action upon the *case*, if the plaintiff declares, that *whereas the defendant had bargained and sold 40 ton of currants, at the rate of 46s. 8d. for every 100 weight, to be delivered to the plaintiff within three months then next ensuing, discomputando ex eodem pretio pro quatuor mensibus, the defendant, in consideration the plaintiff had then paid to him in hand 400l. in part of payment, and assumed to pay the residue to be due, discomputando ut præfertur, for the currants upon the delivery of the currants to the plaintiff; the defendant, in consideratione inde, assumed to deliver to the plaintiff the currants within three months then next ensuing, and assigns a breach for the non-delivery of the currants at the end of three months, according to the promise, and upon not guilty pleaded, a verdict is found for the plaintiff, and damages assessed generally. And though it was objected, that it is not known what is intended by the words in the bargain, to pay 46s. 8d. for every 100lb. discomputando ex pretio pro quatuor mensibus, yet although the Court does not know what is intended thereby, yet it is well known to the merchants, and all is to be given in damages, and if it be not of any sense, nor is known what is intended thereby, then it shall be intended by the Court, that the jury did not give any damages for it.* Mich. 23 Car. B. R. between Brewer and Southwood, adjudged per Curiam. Intratur, Hill. 22 Car. Rot. 1372.]

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S. P. per
Cur. Cro.
C. 328. in
pl. 11. Mich.
5 Car. B. R.,
in case of
Penfon v.
Gooday.—
S. P. Arg.
Cro. C. 237.

7. If an action be brought for words spoken at one time, and for other words spoken at another time, and for the words spoken at one time an action lies, but not for the words spoken at the other time, and damages are intirely assessed, no judgment shall be given, for the action is brought for all the words, and damages for all; per Popham. Cro. E. 329. pl. 2. in case of Brook v. Clark, cites it so held 18 Eliz. in the *Ld. Admiral's case*.

in pl. 19. where the case was, that the defendant said of the plaintiff, being a merchant, viz. *Thou art a rogue, and a beggarly rogue, and I shall prove thee a bankrupt before the next term; and at another day he said of the plaintiff to J. S. Trust him not, for he will be thy undoing.* Found for the plaintiff, and damages intire. It was said the second words were not actionable, and then the damages intire not well given. Resolved, that the words spoken at the second time, as at the first, were actionable, and tend to the same sense, and aggravate the first words; adjudged for the plaintiff. Cro. C. 237. pl. 19. Mich. 7 Car. B. R. Jaxon v. Tanner,

S. P. held
accordingly
by Brampton J.
Mar. 48. in
pl. 76 Trin.
15 Car. in
case of
Thurston v.
Ummins.

8. A Justice of the peace brought an action upon the *case*, against the Bishop of Coventry and Lichfield, because he wrote a letter to the Earl of Leicester one of the privy council, wherein were certain scandalous things of the plaintiff; upon not guilty, it was found for the plaintiff, and 300l. damages; resolved, that although only some of the words will bear action, yet the damages are well assessed, because they are put in only to increase the damages in circumstance; and judgment for the plaintiff. Mo. 141. pl. 283. Pasch. 25 Eliz. Broughton's case.

9. If the plaintiff declare, that he *bought of the defendant divers bona & catalla, viz. unum fulcrum lecti*, Anglice a field-bedstead, with a testern and curtains of Say; *unum canopium*, vocat' a canopy, &c. and that the defendant assumed to deliver *bona præd'* but had not, &c. and there is a verdict for the plaintiff, and general damages; it shall not be presumed, that any damages were given for the testern and curtains, which were not alleged positive, but only expositive; and this exposition is too extensive, for fulcrum signifies the bedstead only; and by 36 E. 3. all pleadings ought to be entered in Latin; adjudged. 10 Rep. 130. a. 132. b. Mich. 2 Jac. Ofborn's case.

10. In action on the case for words, there were divers words spoken some of which were actionable, and some of them not, and the jury have given intire damages for all the words in general. This being assigned for error, the whole Court agreed in this, that some of the words were actionable, and some of them not so, and that the damages given by the jury in general, shall be said to be given for the words, which are actionable, and not for the other words, and so the judgment well given, and so by the rule of the Court, judgment was affirmed. Bult. 37. Trin. 8 Jac. Lynker v. Stanwell.

Cro. E. 328, 329. pl. e. Trin. 36 Eliz. B. R. Brooke v. Clarke, S.P. adjudged accordingly by all the Justices, and for the same reason. — Where a

man speaks words which are in part actionable, and others only put in for aggravation, and damages assessed for the whole, it is good; per Brampton, Ch. J. Mar. 48. in pl. 76. Trin. 18 Car. Thurston v. Ummons.

11. In an action of trespass, for beating, wounding, and imprisoning of the plaintiff, the defendant pleads not guilty, as to part, viz. as to the beating and wounding, and as to the other part, viz. imprisoning, the defendant justifies, that what was done by him, was then so done as a constable, and in the execution of his office, and so justified, the jury found the justification good; but find nothing of the other matter, to which not guilty was pleaded, and yet they assess damages to the plaintiff, for the wounding, for which they did not find the defendant guilty, and so the jury gave damages for that which was not found by them, which was void; there being no ground for them to give these damages, and so by the rule of the Court, this giving of damages for the wounding, which was not found, is erroneous, and the judgment of the Court was therefore for the defendant, quod querens nil capiat per billam. Bult. 64. Mich. 8 Jac. Simpson v. Claye.

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12. If words were spoken at several times, and some of the words were actionable, and some others not, and two several actions brought for these words, and both of them found for the plaintiff, and damages intire given, this is not good; but otherwise it is where there is but one action brought for all the words, and in the declaration laid to be spoken at several times, and intire damages given, as in this case, this is good, and the damages well given; per Haughton, J. and therefore by the rule of the Court, judgment was given for the plaintiff. 3 Bult. 283. Hill. 14 Jac. Meff-Jyne v. Farnden.

13. H. brought an action of assault and battery against L. for beating

Damages.

beating of his servant, by reason whereof he lost his service, &c. for a long time; and declares, that the battery was done on the 19th of January, in the 16th year of his majesty's reign that now is, and that he lost his service for a long time, viz. for the space of six months then next following; and after a verdict for the plaintiff, and entire damages assessed, it was moved, that the original did bear teste before the end of six months. And yet the Court gave judgment for the plaintiff, notwithstanding this exception, for that the viz. is more than needs. Hob, 284. pl. 365. Trin. 17 Jac. Hunt v. Lawring.

14. A. covenanted with the plaintiff to do two things. The plaintiff assigned the breach in the not doing one of them, and concluded, that he was damnified occasione fractionis conventionis prædictæ to such a sum. The jury assessed damages intirely, viz. pro fractione conventionis prædictæ. It was moved, that this was a covenant divided into two parts, and that this assessing the damages includes both parts, and therefore is erroneous; but Montague, Ch. J. and Haughton, J. held, that it shall have relation only to this part, in which the breach is assigned. 2 Roll, Rep. 178. Trin. 18 Jac. B. R. Steele v. Spight.

15. In debt upon a concessit solvere, judgment was given for the plaintiff. It was assigned for error, that there wanted the words pro missis & custagiis, in the assessing the damages; and so it does not appear, for what the damages were assessed; and for this the judgment was reversed, nisi. Sty. 198. Hill. 1649. Pascall v. Sparing.

16. If in debt upon 2 E. 6. for tythes of 70 acres of land, &c. the jury as to 66 acres give damages, &c. and as to the five acres residue give damages, &c. whereas it ought to have been as to the four acres residue, yet this being only a miscounting of the jury, and no damage accrues to any by the mistake, the plaintiff had judgment. Sty. 296. Mich. 1651. Cressit v. Burgis.

16. A. was indebted to J. S. in 6l. and B. (A's son) was indebted to J. S. in 63l. A. in consideration that J. S. would forbear suing for the debts for a month, promised to pay both debts. J. S. brought an action for the 69l. and had judgment. For it shall be intended, that the 69l. are given as damages for the 6l. and in this respect the plaintiff had good cause of action; for the assumpsit being to pay 69l. is intire; and cannot be apportioned by the plaintiff, and therefore upon this assumpsit he cannot have action for the 6l. only. Sid. 38, pl. 8. Pasch. 13 Car. 2. C. B. Best v. Jolly.

[294] 17. Where there are two considerations, whereof the one is good, and the other is void, the damages given shall be intended to be all given for the good consideration. Sid. 38, pl. 8. Pasch. 13 Car. 2. C. B. in a note in the case of Best v. Jolly.

18. In trespass the plaintiff declared of an assault, battery and wounding, the defendant pleaded not guilty, quoad the force, and as to the assault and battery, &c. molliter manus imposuit; upon which they were at issue; and the jury found the defendant guilty, de injuria sua propria, and so recited the whole declaration of the assault

assault, battery and wounding, (where the wounding was not in issue,) and gave damages occasione transgressionis illius to 20l. Error was brought and assigned, and all the Court præter Windham held, that it shall be intended, that the damages are given for all in the declaration, viz. the wounding, which was not in issue, and so it is error; for the plaintiff might have demurred on the plea. Sid. 96. pl. 23. Mich. 14 Car. 2. B. R. Calvert v. Arnold.

19. *Case* was brought against the defendant, setting forth, *that he had retained A. to serve him nine years as an apprentice, and the defendant seduced him from his service such a day, per quod, he lost his service for the residue of the term.* After verdict it was moved, that *the term is not yet expired*, whereas he has recovered damages for the residue of the term, and that A. may yet return and serve him, but that he should have declared of the loss of the service, from the time of the departure till the action brought, and for this reason judgment was stayed by Twisden and Rainsford only in court. Lev. 299. Mich. 22 Car. 2. B. R. Hamilton v. Vere.

Raym. 200.
Hambleton
v. Bere, S. C.
Judgment
was stayed,
and after-
wards ar-
rested, be-
cause the
jury was
guided by
the per
quod.—
s Saund.
169. S. C.

and because the damages were taxed generally, which shall be intended according to the declaration, and if it should be intended otherwise, it would be uncertain what time should be intended, whether for a month or two, or till the action brought, or the verdict given, therefore judgment was arrested per Cur. abscque Kelyng Ch. J.——Comyns's Rep. 232. pl. 129. Mich. 2 Geo. 1. cites S. C.

But in covenant against an apprentice for going away out of his service before his time, per quod he lost his service for the term, which is not yet expired, the plaintiff demurred. Per Twisden, though this would be naught after a verdict, yet being on a demurrer it may be helped; for the plaintiff may take damages for the departure only, and not for the loss of service during the term, and then it will be well enough, and judgment nisi. Mod. 271. pl. 22. Trin. 29 Car. 2. B. R. Horn v. Chandler.

20. *Trespass, &c.* upon not guilty pleaded, there was a verdict for the plaintiff; and it was moved in arrest of judgment, that the declaration was ill; for it was *for erecting and continuing 300 perches of stone wall on the soil of the plaintiff, 2 April, anno 2 W. & M. transgression' præd' quoad continuation' muri præd' a 20 die Februarii anno primo W. & M. usq; diem exhibitionis billæ continuando*, so that the continuance is laid for one year before the commencement of the trespass, and entire damages being given all is void. Sed non allocatur; for this continuando being for a time before the commencement of the trespass, is *senseless and void*, and it cannot be intended that any damages were given for that matter, which in itself is void; therefore the plaintiff had judgment. Carth. 230. Pasch. 4 W. & M. in B. R. Bridges v. Horner.

Comb. 193.
S. C.—
Horner v.
Bridges, and
per Ch. J.
and Eyre
the contin-
ando is void,
because it is
impossible,
and the da-
mages shall
be intended
for the tres-
pass only.

21. *Trespass for taking and carrying away, &c. Continuando itam transgressionem præd.* and it was moved by Carthew, that there could not be any continuance as to the caption. Holt Ch. J. said, it was resolved in the case of BUTLER v. HODGES, in this court, that *no damages should be intended to be given for that which is void*; so here as to the caption, which will not admit of a continuando. Comb. 377. Trin. 8 W. 3. B. R. Hayward v. Wilson.

(R) How

Fol. 678.

(R) *How much Damages shall be recovered [in respect of the Declaration.]*

* Br. Damages, pl. 181. cites S. C. where the plaintiff counted of

[1. **I**N *trespass* the plaintiff shall not recover more damages than the plaintiff hath counted of, though the jury give more; for the plaintiff knows how much he is damaged, better than any other. * 2 H. 6. 7. 8 H. 6. 5. || Co. 10. Pilford 166.

10l. damages, and the jury found 15l. he shall recover only 10l. — Br. Damages, pl. 2. cites S. C. the jury may abridge, but not increase. — Fitz. Damage, pl. 16. cites S. C. and with this accords Ascoug and Newton clearly, 18 H. 6. [but it seems it should be according to Roll. 8 H. 6. 5. a. pl. 11.] and cites 48 E. 3. adjudged as here.

|| This should be 10 Rep. 116. — Jenk. 288. pl. 22. S. C. and that plaintiff released the surplus of the damages, and then had judgment for the damages counted of, and the costs. Damages are for the wrong done before the writ purchased; but costs are pro expensis litis. Adjudged and affirmed in error. Br. Damages, pl. 21. cites 48 E. 3. 7. S. P. — Ibid. 179. cites S. C. — Ow. 45. Pasch. 13 Eliz. Anon. cites S. C. where in trespass of assault and battery the plaintiff declared to his damage of 20l. and the jury found for the plaintiff, and gave 30l. damages; and by the Court, the plaintiff shall recover no more than he has declared for, and this ought to be done of course by the clerks.

Trespass of a register [and boxes of writings, &c.] taken *ad valentiam* 10l. The defendant pleaded not guilty, and it is found *guilty ad damnum* 20l. and yet well, per Cur. For though it be not good but for 10l. he may be indamaged by the taking in 100l. Quod fuit concessum. Br. Damages, pl. 122. cites 7 E. 4. 31.

But where he counts of damages of 10l. he shall not recover more than he counted. Ibid. cites Pasch. 8 H. 6. 7.

[2. **[S]**o if the *tenant vouches*, the demandant shall not recover more damages against the vouchee than he hath counted of; for the vouchee comes in lieu of the tenant, and the judgment is given against the tenant. 8 H. 6. 11.]

Br. Damages, pl. 68. cites S. C. and the defendant by the interpleader

[3. **B**ut the plaintiff in *detinue* may recover more damages against the *garnishee* than he hath counted of; for his count was not against the garnishee, but against the defendant, and damages against him are for the delay after the count. 8 H. 6. 5. 11.]

of the garnishee is wholly excused of damages, and the garnishee has taken this matter upon him. — 10 Rep. 117. b. cites S. C. that in *detinue* the plaintiff shall recover more damages than he has counted of; [but says nothing as against the garnishee.] — Fitz. Damages, pl. 21. cites Mich. 8 H. 6. 4. S. C. and says that the better opinion was, that he shall recover damages as the inquest shall tax; for the garnishee shall recover damages against the plaintiff as the inquest shall tax, and by the same reason the plaintiff shall do the same against him; and besides, the tort, which is in the garnishee, is the *detinue*, which is after the garnishment; for, for the *detinue* before he shall not recover any damages; and cites it adjudged 7 H. 4. that the plaintiff shall recover damages against the assignee. — 10 Rep. 117. b. cites S. C.

[4. **I**n *trespass* for *rescuing a distress*, to his damage so much, if the defendant justifies the rescous upon special matter, upon which it is demurred for the plaintiff, and adjudged for him, he shall have damages as he hath counted; for the defendant hath acknowledged the trespass, and hath * not denied the damages. 21 E. 3. 4. b. [40. b.]]

* See (L) pl. 1.

[5. **S**o in an *attachment upon a prohibition*, if the defendant acknowledges all the trespasss contained against him, the plaintiff shall recover damages as he hath counted. 21 E. 3. 40. b. adjudged.]

6. [S]

[6. [So] in a writ for *substracting his suit to his mill, in the debt and solet to his damage 40l. if the defendant says he cannot deny it, the plaintiff shall recover damages to 40l. as he has counted, * because this acknowledgment is as much as if he had said, that he cannot deny that there is as much damage as he hath counted.* 29 E. 3. 13.]

[7. [So] in a writ of ward, if the defendant acknowledges that the plaintiff hath a right to the ward, the plaintiff shall recover the ward and damages as he hath counted. 38 E. 3. 21. adjudged. Vide contra, 1 E. 3. 4. annuity.]

[8. In an action of waste, if the defendant demurs upon the declaration, and it is adjudged against him, yet a writ shall issue to inquire of the damages. 34 H. 6. 8.]

[9. The jury may give as much damage to the plaintiff as he hath counted, and further give to him costs by itself, though the costs exceed the damages named in the declaration; for the damages are given for the wrong for which the action is brought, and the costs for the charge of suit, the one before the suit, and the other in and for the suit. Tr. 3 Jac. B. R. between * Eagles and Vales, per Curiam, in an action upon the case upon an assumpsit. Co. 10. Robert || Pilfold, 115. b. adjudged in trespass. Contra, H. 39. El. B. R. per Curiam. 12 H. 7. Kelleway 21 b. dubitatur.]

* Cro. J. 69. pl. 11. S. C. and a judgment in C. B. affirmed; and the finding more costs than the damages amounted to is not error for it may

be, that the costs of suit, through long dependance, exceeded the debt.——Yelv. 70. Vale v. Eagles, S. C. & S. P. resolved.

|| Cro. J. 297. pl. 3. Dawkes v. Pilfield, S. C. & S. P. resolved per tot. Cur. But for damages only they may not exceed what the plaintiff himself has declared, and denied 13 H. 7. 16. that the damages and costs assessed by the jury ought not to be for more than the plaintiff counts, to be law; and so a judgment in B. R. was affirmed in the Exchequer Chamber.——Cro. E. 268. pl. 2. Trin. 39 Eliz. B. R. Rivers v. Oodkiri, S. P. For non constat at the time of the declaration what the costs of suit would amount unto.——See pl. 11. infra.

[10. So a fortiori, the Court may increase costs beyond the sum of the damages mentioned in the count. Trin. 3 Ja. B. R. between Eagles and Vales, per Curiam. Co. 10. Pilfold, 115. b. adjudged. Hill. 39 El. B. R. Morgan Wolfe's case, adjudged in a writ of error.]

Cro. J. 69. 70. pl. 11. Eagles v. Vale, S. C. accordingly.—Yelv. 70. S. C.

held accordingly.

[11. But the jury in the case aforesaid cannot tax the damages and costs together to more than is contained in the count, for then it will not be known how much they gave for damages, and how much for costs; for perhaps they might give more for damages than the plaintiff had counted. * 13 H. 7. 16, 17. Co. 10. Robert Pilfold, 117. b.]

* Br. Damages, pl. 203. cites S. C. & S. P. but if they do, it is good for so much as is contained in

the count; per Brian; but all agreed that they should not give costs beyond the sum in the count.——2 Inst. 288, 289. Ld. Coke, on the statute of Gloucester, 6 E. 1. cap. 1. cites S. C. and says, that costs in law are so coupled together as they are accounted parcel of the damages, and therefore if the plaintiff in trespass declare to the damages of 20 marks, and the jury give 20 marks for damages, and 20 marks for costs, yet shall the plaintiff recover in all but 20 marks; for damages, and costs must not exceed the damages which the plaintiff demands by the count, and the entry reciting both the damages and costs, quæ damna in toto se attingunt ad, &c.——In trover it was held, that if the damages and costs had been intirely assessed at more than mentioned in the declaration,

declaration, it had been ill; for now constat but that the damages exceed the damages mentioned in the declaration; and judgment accordingly. Cro. E. 568. pl. 2. Trin. 39 Eliz. B. R. Rivers v. Oodskitt.

[12. In an action of debt upon a bill, if the plaintiff declares to his damage of 10l. and the judgment is given for the plaintiff by *nihil dicit*, and the judgment is, that the plaintiff shall recover *debitum suum præd'*, & *damna sua occasione detentionis debiti illius ad 12l. 10s. eidem querenti ex assensu suo per Curiam hic adjudicat'*, &c. Though here are more damages than he hath counted for, yet because it is the usual course for the Court in such cases to tax damages and costs, it is good; for it may be that all was for costs, and it shall not be intended that the Court hath done otherways than they ought. Mich. 8 Car. B. R. between Sir Richard Greenville and Sandwich, adjudged in a writ of error upon a judgment in Banco. Intratur, Pasch. 8 Car. Rot. 280. Trin. 24 Car. between Parsons and Batchelor, adjudged in a writ of error upon a judgment in Banco. Intratur, Pasch. 22 Car. Rot. 381.]

• Fol. 579.

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13. *Attaint by the heir*, he shall not recover damages, scil. *the issues of the land to the time of the death of his ancestor*. Br. Damages, pl. 156. cites 14 Ass. 2.

S. C. cited Bulst. 49. Arg. — S. C. cited 10 Rep. 117. b. and deemed to be law; for that the

14. In waste the jury found to the damage of 40l. where the plaintiff had declared but to the damage of 20l. The damages here were trebled, Fitzh. Damages, pl. 7. cites H. 34. E. 3. and says he believes the reason is because the statute is that he shall recover the treble of that which the jury shall tax; for in other action he shall not recover more than he counts, &c.

statute is to be intended of damages lawfully taxed; and that so it was held by Ld. Dyer, Trin. 10 Eliz. in waste brought by the Lord Abergavenny that the jurors cannot value the waste more than the plaintiff has counted of; and that with this accords 3 E. 4. Rot. 137. Though in some cases he may recover more than counted of, as in detinue. See pl. 3. supra.

15. If a man brings debt upon obligation in London, the Marshalsea, or elsewhere, and is long delayed, and after is nonsuited, and brings action after in bank, he shall not recover damages for the suit elsewhere, but only for the suit in bank. Br. Damages, pl. 39. cites 2 H. 4. 22.

16. In detinue, the plaintiff shall have no more damages than he has declared for; for the judgment is to have the thing detained, and damages for the detention; if the thing detained cannot be had, the sheriff shall inquire de damnis, and the plaintiff shall have judgment for the value and detention upon, and according to the sheriff's return; that he cannot deliver the thing by the defendant's fault. Jenk. 288. pl. 22.

17. Where an avowant was intitled to two parts only of the rent and the jury assessed damages for the whole rent, the Court held that the avowant could not have judgment unless he release the damages. Mo. 281. pl. 434. Mich. 31, &c. 32 Eliz. C. B. in case of Batty v. Trevillian.

18. In case on a promise the plaintiff declared to the damage of 10l. and upon issue tried, the jury gave 13l. which was more than the

the plaintiff counted for, and judgment was given accordingly, viz. that the plaintiff recover the 13l. by the jury assessed; but it was reversed for this cause in B. R. For the law supposes the plaintiff to know best his own damage and he shall never recover more than he counts for. *But if after such verdict the plaintiff had released all the damages but those of which he counted, and then had judgment, this had been good.* This record was removed from the court of Northampton. Yelv. 45. Hill. 1 Jac. B. R. *Perfival v. Spenser.*

18. Error was brought to reverse a judgment in *detinue* because it was for greater damages than the plaintiff counted for. The Court held that where the plaintiff doth declare no certain damage, there he shall recover such damages as the jury find, but where the plaintiff counts of a certain damage, and the jury do find greater damages, there the plaintiff ought to have no greater damages than according to his count, and not as the jury finds, they finding greater damages than the plaintiff declared upon, and in this action the plaintiff declaring to his damage 100l. and the jury finding for the plaintiff and damages 150l. and he having his judgment for 150l. according to the finding of the jury, and in more than he counted upon, the judgment was reversed. Bullst. 49. Mich. 8 Jac. *Hoblin v. Kimble.*

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19. In *real actions* the plaintiff shall not count of damages, because it is uncertain what they shall amount to and they shall be recovered *pendente brevi.* 10 Rep. 117. 2. Mich. 10 Jac. in *Pilford's case.*

20. *But in personal actions* they shall count to the damage, because they shall recover damages only for the tort done before the writ brought, but not for any thing done pending the writ. 10 Rep. 117. 2. Mich. 10 Jac. in *Pilford's case.*

21. In *trespass* found for the plaintiff, the jury gave him half a farthing damage; and it was moved in arrest of judgment that the damage given by the jury ought to be valuable, and that there is no such coin; sed non allocatur; and judgment for the plaintiff. 2 Roll. Rep. 21, 22. Pasch. 16 Jac. B. R. *Marshall v. Buller.* Cro. J. 458. pl. 4. S. C. but S. P. does not appear. — 2 Jo. 128. cites S. C. and S. P. adjudged.

22. In case the plaintiff declared, that he was seised of several parcels of land, and the defendant, tenant at will of one parcel, and there being a discourse between him and T. S. for the sale of these lands, he (the defendant) said to T. S. that he would keep the possession till the 17th day of August, at which day the defendant said, the plaintiff had no title to that parcel, but one G. D. had; and so the bargain broke off. Adjudged; that though the words were spoken of a parcel of the land, yet the plaintiff shall recover damages for the loss of the sale of the whole. 2 Roll. Rep. 447. Trin. 21 Jac. B. R. *Egerton v. Whittington.*

23. The defendant being a coachman broke a pipe of wine in the street by his carelessness driving the coach, by which a great deal of the wine run out, and was lost, and promised the plaintiff, that in consideration he would forbear to sue him, that he would pay as much

such as he was damaged. In action on the case upon the promise, the plaintiff in his declaration did not set forth, how much the wine was worth that was spilt; but adjudged, that the defendant is bound to take notice of the damage, and the jury have made it certain; and judgment for the plaintiff. Sty. 458. Trin. 1655. Fowke v. Prescott.

24. The plaintiff declares, that the defendant in consideration of 10*l.* promised to let him enjoy certain iron mills for six months; and it appeared that the iron mills were worth but 20*l.* per annum, and yet damages were given to 500*l.* by reason of the loss of stock laid in; and per Cur. the jury may well find such damages, for they are not bound to give only the 10*l.* but also all the special damages. Raym. 77. Pasch. 15 Car. 2. B. R. Nurse v. Barns.

25. Ward brought an action against Hatton Rich *de uxore abducta*, and keeping her from him *usque* such a day, which was some time after the exhibiting of the bill, and concluded *contra formam statuti*. After verdict for the plaintiff, it was moved in arrest of judgment, and the declaration was held good, notwithstanding the impertinent conclusion of *contra formam statuti*, there being no statute in the case. Secondly, the Court resolved, that judgment should be stayed; for the jury shall be intended to give damages for the whole time mentioned in the declaration, As in trespass, with a *continuando* to a day after the writ brought, the plaintiff shall not have judgment after verdict, which gives damages by intendment for the whole time declared for. And Twisden said, these two cases were resolved; a tradesman brought an action in an inferior court for slandering of him in his trade, by which he lost his custom within the jurisdiction of that court & alibi, and it was held maintainable notwithstanding the alibi; the other was an action brought upon the sale of several things for divers sums of money, *quæ quidem pecuniarum summae attingunt ad 10*l.** whereas rightly computed they came but to 9*l.* The jury gave damages less than 9*l.* and it was held good. But if the verdict had been for 10*l.* it had been naught. Vent. 103. Mich. 22 Car. 2. B. R. Ward v. Rich.

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a Salk. 663.
pl. 5. S. C.
and judgment ar-
rested.—
Carth. 386.
S. C. and
judgment
arrested.—
Comb. 442.
S. C. and
judgment
arrested.—
—Ld.
Raym. Rep
248. S. C.
and judgment ar-
rested.—
And the
same dis-
tinction
taken in the

26. In case plaintiff declared, that the 2*d* of July 6 W. 3. he was possessed of a meadow next adjoining to a river, and to another close contiguous to the said river, which time out of mind ran through his meadow to an ancient mill of the defendant's, without any overflowing. That the defendant the 3*d* of August 6 W. 3. enlarged the foundation of his mill further into the river, whereby he so obstructed the river, and exalted the water, that it drowned the plaintiff's meadow, per quod he lost the use and profit thereof, from the aforesaid 2*d* day of July to the time of exhibiting the bill. Not guilty pleaded, and verdict for the plaintiff. And it was moved in arrest of judgment, that intire damages are given to the plaintiff, and from the 2*d* of July to the 3*d* of August, he had no damages at all by his own shewing; and it shall not be intended, that the damages given by the jury are only for the time after the 3*d* of August, for the damages shall be understood to be given not according to law, but according to the allegation of the plaintiff,

plaintiff, who layeth his damage; as resolved in Harbin and Green's case. Hob. 191. Moor, 887. And first, all the Court, except Rookby, seemed to think it well enough; for it may be the plaintiff laid up his meadow for grafs from the 2d of July; but after judgment was arrested; for *though he might lose the profits from that time, he notwithstanding could not lose the use; if he had not said (usum) they might have given judgment for him.* This case is the very same with Harbin and Green. Judgment arrested. 12 Mod. 131. Prince v. Molton.

books cited
above as
to losing
the use
and losing
the profits.

27. In trespasss, assault, battery, and false imprisonment, the plaintiff declares, that the defendant assaulted, beat and imprisoned the plaintiff, the first of October 9 W. 3. and detained him in prison four months. Upon not guilty pleaded, verdict for the plaintiff, and intire damages were given by the jury. It was moved in arrest of judgment, that the declaration was a declaration of Mich. 9 W. 3. and therefore the damages being intire, and given for the imprisonment of four months from the first of October, it appears that the damages were given for imprisonment after the action was commenced. And judgment was arrested. Ld. Raym. Rep. 329. Pasch. 10 W. 3. Brasfield v. Lee.

28. In an action upon the statute of Winchester, in which the plaintiff shewed he was robbed of a bank bill. Upon evidence at the trial summer assises 10 W. 3. at Brentwood in Essex, before Hatfield, Baron of the Exchequer, he directed the jury to give damages for the whole value of the bill, which they did accordingly. Ld. Raym. Rep. 727. Windler v. Chelmsford Hundred.

29. Action upon the case for diverting a water-course 1 Jan. 1 Geo. and continuing it to March 1715. Per quod the plaintiff lost the benefit of the water-course abinde till Apr. tunc prox' sequen'. And after verdict for the plaintiff, it was moved in arrest of judgment, that intire damages were given, when part of the time was to come at the time of the trial; sed non allocatur; for per Cur. the time mentioned March 1715, not being then incurred, it was impossible; for at the time of the action it was not possible that the diversion of the water-course had continued till a time then not come; and therefore when he alleges, that he lost the benefit of the water-course till Apr'. prox' sequen', this is also impossible, and therefore the jury could not have any consideration of it. Comyns's Rep. 231, 232. pl. 129. Mich. 2 Geo. 1. Yalden v. Hubbard.

30. In an action of trespasss brought by the plaintiff in the court of C. B. for entering on his (the plaintiff's) land 25 March 4 Geo. with a continuando the said trespasss to the 25 March, 6 Geo. (which was two years) &c. ad damnum, &c. The defendant justified, by the command of one Green; the defendant replied, and set forth a surrender made to him (the lands being copyhold) and that he was admitted a whole year before he brought this action of trespasss, &c. and at a trial there was a verdict for the plaintiff; and the jury gave damages for that year only, whereas the plaintiff had declared for two years damages; and now, upon a writ of error brought, it was insisted, that though the plaintiff had a verdict,

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yet if the jury did not find enough, it is an insufficient finding, and here they had found damages only for one year, where the plaintiff had declared for two years damages, and the jury cannot *sever the damages for which the plaintiff has declared*; but this was over-ruled by the Court, and the judgment affirmed. 8 Mod. 78, 79. Trin. 8 Geo. Moor v. Thompson.

31. A judgment in C. B. was reversed, because the jury, on the writ of inquiry, had given damages *for a longer time than laid in the declaration, and also to a time after the writ of inquiry was executed* 2 Ld. Raym. Rep. 1382. Pasch. 11 Geo. 1. B. R. Baker v. Bache.

32. The Judge certified the damages (which were 50l.) *to be excessive: but the action appearing to be brought for a very malicious prosecution for felony; and the plaintiff having been imprisoned and tried for felony, the Court were of opinion, that in the nature of the thing, the damages appeared to be moderate, and therefore refused to grant a new trial.* Barnes's notes in C. B. 312, 313. Mich. 7. Geo. 2. Anon.

(S) What Damages shall be given; and for what.

1. **W**HERE a man brings action, and declares of *false imprisonment till he made an obligation of 40l. he shall not recover damages for the obligation, but for the imprisonment*; for he is not grieved by the obligation, till he shall be impleaded, and there he may plead *durels*, and *e contra* of imprisonment till he makes fine, he shall recover damages for the imprisonment and fine; for there he is grieved by *fine in fact*, which is *tort executed*. Br. Damages, pl. 119 cites 2 E. 4. 21.

2. A man shall not recover damages *for the issues and profits in action upon the statute of 5 R. 2. but only for the entry*; for the action is *quod ingressus est*, where entry is not given by law. Br. Damages, pl. 120. cites 2 E. 4. 24.

3. Note; that in replevin of a *cow and pigs*, which pigs were *piggied after the taking*, and yet the plaintiff had replevin of both, and shall recover damages. Br. Damages, pl. 126. cites 12 E. 4. 5.

4. One assumes in consideration of 4d. to pay 10l. damages. They shall be given to the 10l. on non-assumpsit; not to the 4d. Mo. 419. pl. 576. Mich. 37 and 38 Eliz. Colman's case.

5. The disseisee shall have an action of *trespass against the disseisor*, and recover his damages *for the first entry without any regress*: he may have an action of trespass with a *continuando*, and recover *as well for all the mean occupation as for the first entry*. And here note, that Litt. doth here include costs within damages. Co. Litt. 257. a.

[301] 6. In judgment by default in debt on a single bill, the interest *bought to be taxed by the master of the office in the damages*; per tot. Cur. And it was insisted Arg. and not denied, that it was the

the constant practice in all the courts of Westminster-Hall, upon judgments upon default, or confession, to tax the damages occasione detentionis debiti; and therefore the non-payment of interest, when the debt carries interest (as all English bills do) is a damage to the plaintiff; but as to the case of rent, it does not carry interest; and therefore, in such case, no interest shall be given. 2 Ld. Raym. Rep. 773. Trin. 1 Ann. in Scacc. Lapiere v. the D. of St. Albans.



(T) Given. In what Cases.

1. **D**EBT brought of 20l. by obligation, and the rest by lending, and the defendant confessed the obligation, therefore the plaintiff had judgment immediately of it, and to the rest he pleaded to the country, and the plaintiff prayed judgment of the damages of that which was confessed, and could not have it till the other be tried, and after at the nisi prius of it the plaintiff was non-suited, and yet at the day in bank he shall have judgment of the damages of that which was confessed, and might have had it at first, if he would have released the suit of the rest, and so he recovered debt and damages upon the same original, upon which he was non-suited. Br. Damages, pl. 25. cites 42 E. 3. 25.

2. The defendant procured J. S. to bring formodon against the plaintiff by collusion, by which he was forced to travel by the suit, and in bringing a writ of warranty of charters in defence of it, to the damage of 40l. and because the defendant could not deny the collusion, the plaintiff recovered 20l. quod nota, for vexation and collusion only. Br. Action sur le case, pl. 17. cites 43 E. 3. 20.

Br. Disceit,
pl. 9. cites
S. C.

3. Error was brought upon judgment in an account. Because the judgment was to recover damages; but not allowed; for the defendant hath delayed the plaintiff, and pleaded to the issue, which is found against him. So occasione interplacitandi, he shall recover damages. But otherwise, if the defendant comes the 1st day, and enters in the account taken, for to make account. Noy. 134. Brown v. Barwick. cites 2 R. 2. Account. 42. 5 E. 3. 40.

4. Upon demurrer in law the justices may award damages for the party by their discretion, or award writ to inquire of damages at their election. Br. Damages, pl. 194. cites 14 H. 4. 39, 40.

5. Where a bill in Chancery is adjudged insufficient upon demurrer, the defendant shall not have damages; for the statute does not mention, but only where the suggestion is found true or not true, and here the truth is not tried. Br. Costs, pl. 19. cites 7 E. 4. 14. Per Cur.

6. Resolved by the Court, that wheresoever damages are to be given in debt, costs are to attend them; and the reason of the damages is, because the money is not paid upon demand; for if the defendant pleads tout temps prist, &c. the plaintiff must reply, and set forth a special demand, whereupon issue may be taken;

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and if it be found for the defendant, the plaintiff can have neither damages nor costs. Comb. 224. Mich. 5 W. & M. B. R. Company of cutlers, &c. v. Hursley.

* 7. *Attachment in Chancery* on an alias & pluries, is returnable in B. R. and is really an action, whereon the plaintiff shall recover damages for the delay, in not executing the writ. 12 Mod. 164. Hill. 9 W. 3. Per Holt Ch. J. Anon.

1 Salk. 208.
pl. 8. S. C.
accord-
ingly.

8. *Judgment* was in C. B. upon *scire fac. on a recognizance by bail* upon a writ of error, quod, the original plaintiff should have execution upon the recognizance, et quod recuperet damna sua, which he had sustained occasione dilationis executionis. And the exception taken was, that the Court had no power to award damages for delay of execution, but they should give them for costs of suit. Per Cur. damages generally include costs, which word (costs) properly signifies costs of suit, and *delay of execution is properly damage*, viz. the being so long out of his money, which the Court used formerly to assess, by allowing the party the lawful interest: so damages of delay of execution, and costs of suit upon the statute, are very different, and to be assessed by different measures, and the statute gives only costs of suit against the bail, &c. Ideo, per omnes, this is error. 6 Mod. 157. Hill. 3 Ann. B. R. Fanthaw v. Morrison.

As upon
the statute
2 E. 6. 19.
for not setting forth tithes.

9. Where a *penal sum is recovered*, damages are never given. Per Parker, Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

for not setting forth tithes. See Cro. J. 70. Dagg v. Penkevon

10. But upon a *single bill*, even by the common law, damages are given for the delay. Per Parker, Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

(U) In what Cases. Where there is a Demurrer for Part, and Issue for the rest.

1. **T**RESPASS of trees cut and goods taken, the defendant joined issue for part, and demurred for the rest, and the demurrer adjudged against him, and the nisi prius upon the issue, inquired of all the damages, as well of the part in the demurrer, as of the part in the issue, and found the issue for the defendant, and taxed damages for the rest to 10l. Br. Demurrer, pl. 6. cites 38 E. 3. 25.

(W) In what Cases, against the Plaintiff, though Part of the Issue is found for him.

1. **T**RESPASS, assault and battery, to the damage of 10l. and was found guilty of the assault, and acquitted of the battery, and yet the plaintiff recovered 10l. as he had counted, and

and was amerced for the battery. Br. Damages, pl. 108. cites 40 E. 3. 26.

2. Note, in *avowry*, where *part is found for the lord, and part against him*, he shall have return of the whole, and yet shall render damages for the same taking. Br. Damages, pl. 4. cites 2 H. 6. 4.

3. *Rescous* is brought upon distresses taken for rent due at two days, and it appeared by the declaration, that one day is passed, and the other is to come, and the defendant pleaded not guilty; the jury ought to sever the damages; for, for the rent-day passed, the plaintiff shall recover, and for the other not. Br. Damages, pl. 167. cites 9 H. 7. 3. [303]

(X) Several Damages against several Defendants;
and where Plaintiff has his Election.

1. **A**SSISE against several, one alleged jointenancy by deed with a stranger, who upon process came not, by which the assize was awarded, where the other had pleaded misnomer of the plaintiff, and all found for the plaintiff, and against him who pleaded jointenancy double damages was awarded, and single damages against the other, and the double damage shall be levied of him who pleaded jointenancy only, and the other damages shall be levied of him, and the other in common. Br. Damages, pl. 104. cites 22 Aff. 2.

2. Trespass against A. and B. for beating of his servant, and taking of timber; the one was found guilty of the battery, and the other acquitted, and both found guilty of the [taking of the] timber; by which the damages were severed, scilicet, for the battery by itself, and for the timber by itself; and so they did, scilicet, for the damage of the battery one mark, having regard to the service lost by the master, and not to the hurt which the party has, and 100s. for the timber; by which it was awarded, that the one mark shall be recovered against A. who beat him, and the 100s. for the timber against both in common, and the plaintiff amerced against the one. Br. Damages, pl. 107. cites 22 Aff. 76.

3. In trespass against two, if the one comes and pleads, and is convicted to the damage, &c. and the other comes and pleads, and is convicted, the second jury shall not give damages; for the second who pleads, shall be charged by the first verdict, quod nota. Br. Damages, pl. 29. cites 44 E. 3. 7. and lib. Aff. p. 5.

4. A. brings trespass against three; one appears, and pleads not guilty; afterwards another appears, and pleads not guilty; afterwards the third appears, and confesses the action; two venire facias's were awarded to try these two issues; on the first issue 200l. damages are found for the plaintiff; the other jury finds 150l. damages; the plaintiff shall have his election which damages he will have; for it is not certain which of the issues was first tried; S. P.

12 Rep. 3.
Trin. 10.
Jac. Hey-
don's case,
S. C.—
And ibid.
7. s. the 4th
resolution,
S. P.
for ———

J. 348. pl. for they were tried at the same assizes, and the damages taxed by the
 2. Trin. 14 first jury ought to stand for all. Jenk. 269. pl. 86.
 Jac. B. R.
 Cobb v. Hrydon, S. C. and judgment in C. B. affirmed.—Roll. Rep. 30. pl. 3. S. C. and
 judgment affirmed.

5. In trespass against A. B. and C.—B. and C. justify; upon which there is a demurrer, and A. pleads, and thereupon issue is joined, and the demurrer is adjudged against B. and C. and upon a writ of inquiry, damages are given against B. and C. and after the issue is found for the plaintiff, and damages given; the plaintiff may have his election which damages he will take. 1 Roll. Rep. 395. pl. 17. Trin. 14 Jac. B. R. Headley v. Mildmay.

[304] 6. Error of a judgment in an appeal of mayhem in Durham; the error assigned, because the plaintiff declared there, in an appeal against them, that they, with a third, made the mayhem. They pleaded several pleas, whereupon several issues were joined, and verdict for the plaintiff, and against J. upon the trial 50l. damages were found, and against R. 100l. damages; and the plaintiff prayed judgment against both for the 100l. damages and costs, and had it; and now error is brought and assigned, because the plaintiff hath judgment for the 100l. damages, and doth not release the damages for the 50l. But the Court conceived it to be no error; for the judgment being for the 100l. by the election of the plaintiff, it is a waiver of the other damages, and he cannot have both; therefore he needs not release the damages of 50l. whereupon the judgment was affirmed. Cro. C. 192. pl. 2. Trin. 6 Car. in B. R. Johns & al^r v. Dodsworth.

(Y) Where they shall be joint.

1. **A**N action upon the stat. 1. 2. M. for driving distresses and impounding them in several places, so that the owner was put to several replevins, and it was against three defendants, and upon not guilty it was found for the plaintiff, and 40s. damage assent by the jurors against every defendant severally. And judgment was given for the plaintiff that he should recover the penalty of the statute (viz.) against every one 5l. and for damages against every one 40s. trebled; upon which a writ of error was brought, and error assigned was in the point of the judgment (viz.) because the damages and the penalties are severed. (viz.) every defendant by himself, where it ought to have been jointly, (viz.) all one. And that was adjudged error, and the first judgment reversed. For but one 5l. shall be inflicted upon all the defendants, and not several 5l. by the statute; yet the words are that every person offending shall pay 5l. but the meaning of the statute is, that the penalty shall be referred to the offence, not the persons, then because there was but one offence in all the defendants, there shall be but one 5l. forfeited. Noy. 62. Hill. 39 Eliz. B. R. Patridge v. Emson.

2. So by Popham. If two distress, and they alike drive the distress,

disseins, there shall be only one action and one penalty which was granted. Ibid.

3. So by Gawdy upon the statute that enacts that every one that sues in the Admiralty for a thing done upon the land, shall forfeit 10l. There if two commence an action, contra formam statuti, yet but one 10l. shall be forfeited. Ibid.

4. So upon the statute of 5 Eliz. of forgery against twenty but one double damages shall be given against all. And by Popham and Fenner; that where twenty are so jointly sued, a release to one shall discharge all. But by Fenner, if the plaintiff had brought his action against them severally, every one should have paid 5l. sed quære. Ibid.

(Z) Barred by What.

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1. **I**N assise if the plaintiff enters into parcel, he shall lose all his damages, for they are intire and cannot be severed. Br. Damages, pl. 180. cites 35 H. 6. 13.

(A. a) Writ. How it shall be.

1. **N**OTE by the best opinion, that where damages are given by statute and new form of writ, the plaintiff shall not recover damages by the statute, if he does not bring his writ upon the statute, as in trespass de malefactoribus in parcis, but where the statute gives damages, and no new form of the writ, there the plaintiff shall recover according to the statute by the common form of the writ; note the diversity thereof; and in assise if the disseisin be found with force, the plaintiff shall recover double damages, and yet the writ is not but of the common form. Br. Damages, pl. 8. cites 9 H. 6. 2.

(B. a) Writ of Inquiry of Damages; in what Cases awarded; and How it may be.



1. **I**N assise the plaintiff prayed estrepement, and could not have it; and the defendant commits waste in the mean time, between the verdict in the assise and the judgment, and a writ of inquiry of damages was awarded of this waste and cutting of trees; which note well, for the verdict before can't give damages thereof. Br. Brief de enquire, &c. pl. 13. cites 21 E. 3. 3.

2. In debt the defendant acknowledged part, and denied the rest, upon which they were at issue, and the plaintiff had judgment of part, and for the rest at nisi prius he was nonsuited; and yet, at the day in bank, he had a writ to inquire of damages, quod nota. Br. Brief de enquire, &c. pl. 16. cites 42 E. 3. 25, 26.

3. In dower the tenant said, that he has been at all times ready to render tampa prisa.

pl. 40. cites *render dower, and yet is*, by which the demandant recovered dower presently, and *averred the contrary against the tenant for her damages*, and prayed a writ of inquiry of damages, and could not have it; for *issue thereof shall be joined and tried by nisi prius*. Br. Brief de enquire, &c. pl. 18. cites 34 E. 3.

4. In *dower* the tenant made *default after default*, per quod the demandant *averred, that her baron died seised*, and prayed a writ of inquiry of damages, & habuit. Br. Brief de enquire, &c. pl. 17. cites 44 E. 3. 3.

[306] 5. Where the *defendant, or the bishop, pleads ne disturba pas*, the plaintiff shall have a writ to the bishop, and writ of inquiry of damages. Br. Brief de enquire, &c. pl. 6. cites 22 H. 6. 44. and 21 H. 6. 56.

6. *Waste* was brought, and the *defendant demurred* upon the declaration, that the reversion does not pass by devise by name of tenement, nor without attornment, which was *adjudged against him* in both points, and there it was awarded, that he shall not have writ of inquiry of waste, for he is *convicted of the waste* by the demurrer, but he shall have a writ of inquiry of damages, but the plaintiff released his damages, and had execution. Br. Brief de enquire, &c. pl. 1. cites 34 H. 6. 7.

7. Error of a *judgment in debt*; the error assigned because the judgment is, *ideo consideratum est quod recuperet 40s. pro misis & custagiis, omitting these words, ex assensu suo per Curiam ei adjudicat*. And it was held to be a material part of the judgment, for being *by confession or default* writ of inquiry of damages shall be awarded, unless the party consents to take so much for damages; and for this cause it was reversed. Cro. J. 415. pl. 3. Hill. 14 Jac. B. R. Machin v.

8. In an action upon the *case*, the *plaintiff declares to 17l. damages*, and upon *demurrer judgment given for 17l. 10s. damages by the Court*. And now that judgment was reversed. Because the *damages being uncertain, there ought to issue a writ of inquiry of damages*. Otherwise where the demand is certain, as in debt, Note 11 H. 7. 5. b. Noy 96. Pasch. 2 Car. B. R. Wood v. Brook. S. C. says the declaration was, that the defendant indebted to him in 16l. upon account, and in consideration that he would forbear, the defendant promised to pay, &c. and upon *nihil dicit*, judgment was quod recuperet damna sua prædicta; and because no writ of inquiry was, the judgment was reversed. This was a judgment out of an inferior court.

9. Error of judgment in *assumpsit in an inferior court*; the parties being at issue, there was a *demurrer upon the evidence*, and thereupon the jury was discharged; afterwards *judgment was given for the plaintiff*, and damages found upon a writ of inquiry, where the jury, which was to try the issue, ought to have assessed damages conditionally, if judgment should be given for the plaintiff; and several precedents were cited in proof thereof; but the Court said, that if these precedents are good law, then it may be inquired by the same jury conditionally; but that it may be as well inquired of by a writ of inquiry of damages, when the demurrer is determined, and the most usual course is, when there is a demurrer upon evidence,

pl. 40. cites
34 E. 3. and
Fitzh. En-
quell. 57.

Lat. 213.
S. C. in to-
tidem ver-
bis.—Ibid.
211. Brook
v. Wood.
S. C. says
the declara-
tion was, that the defendant indebted to him in 16l. upon account, and in consideration that he would forbear, the defendant promised to pay, &c. and upon nihil dicit, judgment was quod recuperet damna sua prædicta; and because no writ of inquiry was, the judgment was reversed. This was a judgment out of an inferior court.

S. C. cited
5 Mod 119.
—Skinn.
596. S. C.
cited per
Holt Ch. J.
—S. C.
cited by
Holt Ch. J.
Comb. 344.
—S. C.
cited by
Holt Ch. J.
12 Mod. 85.
—S. C.
cited Arg.

thence, to discharge the jury without more inquiry. Cro. 143. Ld. Raym. Rep. 60.
pl. 21. Mich. 4 Car. B. R. Darrofe v. Newbolt.

10. Plaintiff in a *replevin* was nonsuited after evidence given to the jury, and the jurors did not find costs and damages; and afterwards a writ of inquiry of damages was granted. And Athley moved, that the writ might not be filed. Because that the writ of inquiry of damages could not issue, but be awarded from the Court; and the plaintiff here being nonsuited was out of the court, and that nothing might be done against him. And the prothonotaries said, that in case of a verdict, where the jurors omit to find damages, a writ of inquiry is many times granted. But they were commanded to search for precedents in case of a nonsuit. Het. 161. Hill. 5 Car. C. B. Rawlins's case.

11. In *detinue of charters*, there was verdict for the plaintiff and damages, but the *value of the charters were omitted*, (which is part of the judgment, and to be had in case the charters cannot) and it was moved, that it may be supplied by a writ of inquiry of damages, and according to this is a precedent Old Ent. Rast. tit. Judgment in *detinue*, pl. 13. fol. 214. and 41 Eliz. in B. R. Rot. 916. Chipendale and Orn's case. And the reason why the verdict may be supplied in such case is, because it is only matter of damages, upon which no attain lies, but the Court doubted of it. Sid. 246. Pasch. 17 Car. 2. B. R. Burton v. Robinson.

12. In *replevin* the jury did not inquire of the *value of the rent arrear*, resolved after several debates, that this cannot be supplied by writ of inquiry. Lev. 255. Mich. 20 Car. 2. B. R. Sheape v. Culpepper.

Raym. 170.
Word v.
Culpepper.
S. C. —
Sid. 380.
pl. 12. S. C.

the Court doubted & adjournatur. — Vent. 40. S. C. the Court held, it could not be supplied. — S. C. cited by Holt Ch. J. Skinn. 596. and says, the reason is, because the statute says, that such inquiry shall be by the same jury. — Ld. Raym. Rep. 60. S. C. cited by Holt Ch. J.

But where in *replevin* and *avowry for damage feasant*, the plaintiff was nonsuited. The omission of the jury was supplied by a writ of inquiry. Comb. 11. Hill. 1 & 2 Jac. 2. B. R. Hamdrey v. Mildale.

13. Where damages are *uncertain*, they cannot be set in a court of equity but by a jury. Vent. 330. Trin. 30 Car. 2. in an anonymous case.

14. In *debt* because the demand is certain, the courts here have sometimes assessed damages without a writ of enquiry, but never in *trespass* or *actions sur case*, which lie wholly in damages. Vent. 330. Trin. 30 Car. 2. in an anonymous case.

15. A *verdict is good, notwithstanding the omission* of inquiring of damages on the demurrer; for as to that, it is but an inquest of office, and may be supplied by another writ; cites Dy. 135 12 Co. 6. a. But if the verdict would have been deficient for this cause, it is aided by a *nolle prosequi*; for where a verdict is *insufficient by assessment of intire damages, or non-assessment of damages* and costs, where they ought to be assessed, it cannot be supplied by a writ of inquiry; but release of damages and costs remedies suits and imperfections in the verdict. Arg. 12 Mod. 12. Mich. 3 W. and M. in case of Germin & Ux' v. Orchard.

16. 'Tis the course of the court to give interest for damages upon

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Damages.

upon a *single bill*, or *bill of exchange* (which must always be under the sum laid in the close of the declaration) in case of a *demurrer in debt*, and there needs no writ of inquiry. Per Holt Ch. J. Cumb. 243. Pasch. 6 W. and M. in B. R. Anon.

And at another day in this term the Court solemnly declared, that a writ of inquiry should go in this case, for per Holt

17. A *distress* was taken for a *poor's rate* and a replevin brought, and upon not guilty pleaded by the officer at the trial, evidence was given, and the *jury charged and ready to give their verdict*, the *plaintiff became nonsuit*, by which the officer was intitled to treble costs and damages, but the jury departed without assessing them, upon which the Court was moved for a writ of inquiry, and after being twice moved, rule was given for a writ of enquiry. Skin. 595. Mich. 7 W. 3. B. R. Sir James Harbert's case. Ch. J. the jury here are discharged from giving their verdict by the nonsuit, and therefore if they had given a verdict for the damages, this had been as an *inquest of office*, upon which no attain would lie, if the damages had been excessive; and therefore here is no default in the jury, or damage to the plaintiff, it is to be supplied by a writ of inquiry; but where the jury gives a verdict, and does not give damages, there such a defect shall not be supplied; for if the jury had given damages, this was as *part of their verdict upon which an attain lay*, if they are excessive; and therefore this shall be supplied by a writ of inquiry, which is but an *inquest of office*; if the damages are excessive, the party shall be oppressed without the benefit of an attain, and therefore according to CHENEY's case, such default shall not be supplied by a writ of inquiry. Skin. 595. in S. C. — 5 Mod. 118. Herbert v. Waters, S. C. and a writ of inquiry was granted, — 1 Salk. 205. pl. 3. S. C. — Comb. 344. S. C. the writ was granted. — 12 Mod. 85. S. C. accordingly. — Ld. Raym. Rep. 69. S. C. — Carth. 36a. S. C. and the writ was granted after much debate.

[308] In which case such a default had been supplied after by a writ of

inquiry. 1 Cr. 143. and Holt Ch. J. cited 1 Roll. Rep. 272. Brampton's case, and 2 Roll. 119. as cases [Rep.] in point; Skin. 596. Sir James Harbert's case. — 5 Mod. 119. S. C. & S. P.

12 Mod. 85. S. C. & S. P. for the finding damages was part of the issue; per Holt Ch. J. — Ld. Raym. Rep. 59. S. C. & S. P. per Holt Ch. J.

Holt Ch. J. said, that notwithstanding this case of Burton & Robinson,

he remembered a case about 14 years ago, where a writ was awarded in such case, 5 Mod. 77. in case of Harcourt v. Weekes, — S. C. of Burton v. Robinson, cited by Holt Ch. J. Ld. Raym. Rep. 60. but said, that it was contrary to law.

18. For if upon a *demurrer upon evidence* the jury be discharged, there shall be a writ of inquiry; for the jury does not give any verdict, and therefore they cannot assess the damages, and the same reason holds upon a nonsuit, per Holt. Skin. 595. in Sir James Harbert's case.

19. But otherwise where they give a verdict; for there a defect of assessing damages shall not be supplied by a writ of enquiry, for in such case the jury have misdemeaned themselves; for if they had given damages too high, &c. they might be attainted, and they are bound to give damages, but in the other case it is otherwise; per Holt Ch. J. Skin. 595. in Sir James Harbert's case.

20. In a *detinue of charters* where they did not inquire of the value of the charters, Holt said, he had heard that there was a writ of enquiry granted, but that he was not satisfied with it, for the reason which is given in Cheney's case. 10 Rep. 119. per Holt Ch. J. 596. cites it as the case of Burton and Robinson.

21. Action of *trespass*, and the defendant justifies by virtue of the statute of 43 Eliz. for the *poor's rates*, &c. the plaintiff was nonsuited but no damages were found; therefore counsel moved for

for a writ of error; Holt Ch. J. said he remembered a case, where upon an action of *detinue* and upon issue non detinet, the jury did not inquire of the value and afterwards we granted a writ of inquiry. It is every day's practice, that if the plaintiff in *replevin* be nonsuit, the jury shall find damages and costs for the avowant. 5 Mod. 76. Mich. 7 W. 3. Gardner v. Hobbs.

22. Where judgment is by default the court may give the damages without putting the party to the trouble of a writ of inquiry. 10 Mod. 274. Hill. 1 Geo. B. R.

23. The plaintiff declared on four counts, and the defendant demurred to one, and pleaded to issue as to the other three, and the plaintiff joined in demurrer, and had judgment and a writ of inquiry, reciting a judgment de præmissis, and that *recuperare debet damna occasione præmissarum*; and now it was moved in arrest of judgment, that a writ of inquiry would not lie on this judgment, until *nolle prosequi* was entered as to the other three issues or a venire to try them; for then, and not before, a writ of inquiry might be had to inquire of the damages upon the judgment in demurrer; but in this case the plaintiff having remitted the damages, as to the other three issues, before the judgment was entered on the demurrer, it was held good; and the master of the office affirmed, that was the proper method of proceeding. 8 Mod. 108. Mich. 9 Geo. Fleming v. Parker.

24. In an action on the case on several promises the plaintiff had judgment by default. It was assigned for error that there was no writ of inquiry; and it seems the case was, that the inquiry of damages was made by a parcel of people got together of their own heads, whom the sheriff had no authority to convene for that purpose, so that it was urged that what they did, should be of no account. But the Court held that the want of a writ of inquiry was aided by the late act for amendment of the law. Gibb. 162, 163. [309] Mich. 4 Geo. 2. B. R. Mallory v. Jennings.

25. In an action of covenant, three breaches were assigned, one whereof was confessed, and the other two controverted, and a venire facias was awarded to try the issues joined between the parties, and to assess the plaintiff's damages as to the breach confessed. Upon the trial, plaintiff obtained a verdict; damages were neglected to be assessed as to the breach confessed, which was for non-payment of rent. A writ of inquiry was moved for to assess the damages upon the breach confessed. The Court granted a rule nisi, which was afterwards made absolute. Barnes's Notes in C. B. 148. Mich. 7 Geo. 2. Townsend v. Pool.

(C. a) Inquiry of. In what Cases by Default.

1. **I**N trespass the defendant appeared, and pleaded, and departed in despite, and after plea pleaded, a writ shall issue to enquire of all the damages, but after the plaintiff released the departure. Br. Brief de enquire, &c. pl. 3. cites 9 H. 5. 15.

2. In

Br. Default, pl. 29. cites S. C.—Br. Departure, in Despite, pl. 4. cites S. C.

2. In trespass the defendant *acknowledged the trespass, and justified*, and after *made default at a day of adjournment*, and the inquest was awarded by default, and there is no writ to inquire of the damages. Br. Brief de enquire, &c. pl. 4. cites 9 H. 5. 15.

3. In *detinue* the plaintiff and garnishee are at issue, and *at nisi prius the garnishee made default*; judgment shall be given by his default, and the inquest shall not be taken upon the issue, because by default the issue is waived, and the *inquest shall inquire of the damages*, and the garnishee shall not have attain; per Martyn & tot. Cur. Br. Enquest. pl. 57. cites 8 H. 6. 5.

4. Trespass against *three*, who *imparled* till another term, and at the day *one made default*, therefore a writ of inquiry of damages was awarded against him, and yet *the other two pleaded a plea in bar, and intitled the third to all*, quod nota. Br. Brief de enquire, &c. pl. 5. cites 19 H. 6. 8.

5. In *trespass* the defendant *imparled* till another term, and at the day made default, and the plaintiff had a writ of inquiry of damages. Br. Brief de enquire, &c. pl. 14. cites 1 H. 7. 11.

6. In *trespass* against *two*, they *pleaded in bar*, and in another term *the one made default*, writ of inquiry of damages shall be awarded against him to continue the process against him, but the writ shall not issue; for the first jury shall tax damages against both, if they pass for the plaintiff, and then the writ of inquiry shall never issue, and if they pass against the plaintiff, then the writ of inquiry shall issue, &c. quod nota. But where the first jury assesses damages, the second jury shall not assess damages. Br. Discontinuance de Process; pl. 25. cites 21 H. 7. 40.

[310] (D. a) Inquiry of. Writ quashed or superseded; for What; and When. And Notice; In what Cases; When; and How.

1. ERROR assigned upon a judgment in Shrewsbury Court; first, because upon the writ of enquiry of damages *no day was given* to the plaintiff. Secondly, Upon the return of the writ of enquiry, &c. It was *entered continuata processu jurata ponitur*, &c. in respect that it is a proper continuance for a pannel to try an issue and not upon an inquest of office, as so it is. But that *ought to be returned to be executed, or that the sheriff hath not sent the writ*, because it is not yet executed. And for these errors judgment reversed. Noy. 120. Harrington's case.

2. Error of a judgment in B. R. in *trover*, where *the bill was for 400 bushels of pippins*; and the declaration was *for 40 bushels*, and judgment being given *on nihil dicit*, the writ of inquiry recites *the trover of 400 bushels and damages found to 40l.* All the justices and barons held this to be error; for *the judgment ought to be warranted by the declaration on the record*; and rule was given to reverse the judgment. Cro. Ji 294. pl. 14. Mich. 9, Jac. in Cam. Seaca. Cleyton v. Taylor.

3. Judgment

3. Judgment in an inferior court was reversed, because being by default the writ of inquiry of damages was only by two jurors, and custom alleged to warrant it. But though the writ is per sacramentum proborum & legalium hominum, and not duodecim, as a venire, yet the Court resolved that there cannot be less than twelve. Vent. 113. Pasch. 23 Car. 2. B. R. Anon.

4. In an attachment upon a prohibition, it was alleged that the defendant had sued post prohibitionem inde sibi deliberatam. The defendant made default, and upon a writ of inquiry of damages, the jury gave 100*l*. And for these damages and 28*l*. costs judgment was given for the plaintiff in Ireland, who was defendant here; the error assigned was, that the jury upon the writ of inquiry did not come de vicineto of the Spiritual Court, where the prosecution was after the prohibition, but elsewhere; and per Cur. for this reason the inquisition is void, and the judgment was reversed. Hill. 31 & 32 Car. 2. B. R. 2 Jo. 128. Aungier v. Brogan.

See Tit.
Trial.
(H. 2. 4) pl.
11. S. C. and
the notes
there.

5. No motion for a new trial, or to set aside a writ of inquiry of damages, after motion in arrest of judgment. 12 Mod. 158. Mich. 9 W. 3. L'fle v. Armstrong.

6. In C. B. they never give a day upon a writ of inquiry, nor is it necessary; for nothing is to be done but to ascertain the damages and is no discontinuance; and though upon the writ of inquiry it was mentioned to be per sacramentum duodecim, and did not say proborum & legalium hominum, yet it was held good; for the entries in C. B. are always so. Ld. Raym. Rep. 388. Mich. 10 W. 3. B. R. Northcott v. Underhill.

1 Salk. 199.
S. C. but
S. P. does
not appeal.

7. In trover for several loads of wood and judgment by default, and a writ of inquiry executed; it was moved to set aside the writ of inquiry, upon affidavit that the sheriff refused to receive any evidence of the value of the wood, but directed the jury to find the full damages declared of, and for that it was set aside upon payment of costs. 12 Mod. 317. Mich. 11 W. 3. Earl of Kent v. Walters.

8. Convenient notice is as requisite to the executing a writ of inquiry, as for a trial; agreed per Cur. and that by a late rule of Court, if it is to be executed in London, or in Middlesex, and the defendant doth not live above forty miles from thence, eight days notice will suffice; but if he lives above forty miles from thence, then fourteen days notice ought to be given; because at twenty miles per day, a man may come to London from any part of England in fifteen days. Mod. Cases 146. Pasch. 3 Ann. B. R. Williams v. Jackson. [311]

9. 4 & 5 Annæ cap. 16. All statutes of jeofails shall extend to judgments entered upon confessions, nihil dicit, or non sum informatus, in any court of record; and no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon, be stayed or reversed for any imperfection, omission, defect, or thing which would have been aided, or cured by the said statutes of jeofails, if a verdict had been given in the action, so as there be an original writ and warrants of attorney duly filed.

10. It was moved in arrest of judgment that there was not fifteen

Damages.

teen days between the teste and the return of the writ of inquiry; for in all judicial writs, where you proceed by original, there must be fifteen days between the teste and return, not only in the writ, but also in the subsequent process. And accordingly, the Court (Holt absente) inclined that it was ill. Sed adjournatur 11 Mod. 260. pl. 15. Mich. 8 Ann. B. R. Gately v. Gillingham.

11. It was declared by the Court, upon a motion, that all notices of trial, and of inquiries, and countermands of notices, ought to be in writing, and that all verbal notices were void. Rep. of Prac. in C. B. 3. Pasch. 11 Ann. 1712. Anon.

But in such case the Court set aside a writ of inquiry, because executed above a year after interlocutory judgment, and a term's notice not given.

12. Upon a motion in relation to the due execution of a writ of inquiry of damages, the Court held, that after an interlocutory judgment signed, the plaintiff need only give common notice of the execution of a writ of inquiry, notwithstanding the judgment was signed above a year before. Rep. of Prac. in C. B. 4. Trin. 11 Ann. 1712. Anon.

The Court set aside the inquiry, because a term's notice should have been given; and so in all cases of notices, where there have not been any proceedings within a year, a term's notice must be given. Rep. of Prac. in C. B. 97, 98. Hill. 7 Geo. 2. Paul v. Gledhill. — Barnes's Notes in C. B. 206, 207. S. C. accordingly.

13. In this case the question was, whether upon the execution of a writ of inquiry of damages in dower, notice of executing that inquiry should be given; and upon hearing counsel on both sides, the Court were of opinion that notice ought to be given, and for want thereof, set aside the writ of inquiry: for upon any writ of inquiry whatsoever, it is very reasonable that the party should have an opportunity of defending himself in respect to the measure of damages. Rep. of Prac. in C. B. 14. Mich. 4 Geo. 1. Strangeways v. Ascough.

14. It is admitted, that in covenant, where damages are to be recovered, the jury upon a writ of inquiry are the proper judges of the quantum of the damages; and for that reason the Court will not set aside their inquiry where they give small damages; but it is otherwise where the covenant is for payment of money, and the sum is ascertained, because in such case the sum being certain, the jury cannot lessen the damages; and this is the constant difference in such cases, and it is the same as if an assumpsit had been brought for money upon a note under hand, for there the jury cannot mitigate the damages; if they do the Court will set their verdict aside. 8 Mod. 197, 198. Mich. 10 Geo. in the case of Parr v. Purbeck.

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Defendant appeared by his attorney, and

after judgment plaintiff gave notice of the execution of a writ of inquiry to defendant himself, (and not to his attorney) which was held bad notice, and the writ of inquiry and inquisition taken thereupon were ordered to be set aside. Notes in C. B. 215. Mich. 10 Geo. 2. Lee v. Bradford.

15. It was held by the Court that notice of trial, or inquiry must be delivered to the defendant, where the attorney is not known, or not to be met with. Rep. of Prac. in C. B. 62. Hill. 4 Geo. 2. Higgins v. Stuart.

16. Action upon the case for goods sold and delivered upon the execution of the writ of inquiry, jury allowed plaintiff 6l. 5s. interest for the balance of the account due to him. Defendant moved

to

to set aside the inquisition; and the Court were of opinion that interest could not be allowed in any case, except upon promissory notes and bills of exchange, and that the inquisition ought to be set aside. But by consent the 6l. 5s. part of the damages were ordered to be remitted by the plaintiff to save the expence of a new inquiry. Barnes's Notes in C. B. 149. Pinock v. Willet.

17. An action upon the *case was brought on a promissory note*, to which the defendant, with leave of the Court, had pleaded doubly, viz. *non ass.* and *non ass. infra sex annos*. Plaintiff took issue upon the *non ass.* and replied *an original as to the non ass. infra sex annos*. And thereupon issue was joined upon *nul tiel record*. Plaintiff, upon the last issue, obtained judgment; and thereupon proceeded to execute a writ of inquiry of damages, without trial of the first issue. Defendant moved to set aside the writ of inquiry; and the Court, upon hearing counsel on both sides, ordered the writ of inquiry and inquisition taken thereon to be set aside. Barnes's Notes in C. B. 150. Hill. 7 Geo. 2. Pryor v. the Earl of Islay, Executor of the Earl of Suffolk.

18. A motion to set aside an inquiry, because *one of the defendants was not served with notice of the execution of the inquiry*. Per Cur. where the proceedings are according to the act 12 Geo. 1. and no attorney appears, each defendant ought to have notice; so the inquiry was set aside. Rep. of Prac. in C. B. 94. Mich. 7 Geo. 2. Kingdon v. Herne and Frost.

19. A motion to set aside a writ of inquiry for *uncertainty in the notice*; the notice given was, that the writ *should be executed at a certain hour* (mentioned in the notice) *or as soon after as the sheriff could attend*; the Court unanimously agreed that this notice was irregular for the incertainty, and granted a rule to shew cause, which was afterwards made absolute. Rep. of Prac. in C. B. 99. Pasch. 7 Geo. 2. Hannaford v. Holman.

Barnes's
Notes in
C. B. 207.
Pasch. 7
Geo. 2 S.C.
according-
ly.

20. Notice of the execution of a writ of inquiry of damages was given *for a particular day, but no hour was mentioned*. Defendant moved to set it aside, and obtained a rule nisi; plaintiff, on shewing cause, swore that *defendant, after the notice given, had declared he would make no defence*. Court was of opinion, that this was not sufficient to make the notice good, and therefore set aside the inquiry, but without costs. Barnes's Notes in C. B. 204. Mich. 7 Geo. 2. Langstaffe v. Lamb.

21. Plaintiff replied to a plea of a record of a former recovery of the same debt, *quod non habetur aliquod tale recordum*, and gave notice upon the back of the replication to execute a writ of inquiry of damages, in case judgment went for him upon the issue of *nul tiel record*. Defendant moved to set aside the inquiry for want of due notice, and insisted that this case is not within the letter of any of the rules of court obliging defendants to take short notice. A rule was made to shew cause, which was afterwards discharged upon hearing counsel on both sides. If this case be not within the letter of the rules, it is within their intention, and is warranted by the constant practice of the Court. Barnes's Notes in C. B. 174. Hill. 8 Geo. 2. Long v. Lingood.

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Rep. of
Præd. in
C. B. 113.
S. C. accord-
ingly.—
Same points
cited as held
accord-
ingly, Co-
myns's
Rep. 551.
—S. C.
cited

Barnes's Notes in C. B. 215.

* Notes in C. B. 207. Pasch. 7 Geo. 2. *Foster v. Smalles*, S. P. and ruled to shew cause why the inquiry should not be set aside.—So where the notice was of executing it between 11 & 2. Barnes's Notes in C. B. 210. Trin. 7 & 8 Geo. 2. *Robinson v. Philips*.

22. Notice was given to execute a writ of inquiry of damages, at the sheriff's office in Northampton*, between the hours of ten and two. Upon hearing counsel on both sides, the Court was of opinion, that the notice was bad, both as to place and time. It should have been expressed at what sign, or whose house, the sheriff's office was kept at; and the time is too extensive, which ought to be confined to two hours. The writ of inquiry and inquisition taken thereupon, were set aside. Barnes's Notes in C. B. 211. Hill. 8 Geo. 2. *Squire v. Almond*.

23. Notice of the execution of the writ of inquiry was twice continued. Court held the second continuance bad. A notice can be continued but once. The first continuance was also bad, not being served till within an hour before the time appointed for the execution of the writ of inquiry; it should have been served two days before. Notes in C. B. 210. Mich. 8 Geo. 2. *Price v. Bambridge*.

Comyns's
Rep. 551.
S. C. and
the writ was
set aside, by
the opinion
of all the
Court.—
Rep. of
Præd. in
C. B. 233.
S. C. accord-
ingly, but
if it had
been said in
Brook-

street, Holborn, it would have been good.—Plaintiff gave notice of the execution of a writ of inquiry of damages at the sign of the Bell, without making mention of any town, which notice was held insufficient, and the inquiry set aside. Barnes's Notes in C. B. 218. Pasch. 11 Geo. 2. *Hollis v. Westbury*.

24. Notice was given of the execution of a writ of inquiry of damages, at the Three Tons in Brook-street, without saying in Holborn, or elsewhere, though there are three streets of that name in Com' Midd'. On a motion to set aside the writ of inquiry for this defect in the notice, it was urged for the plaintiff, that the Three Tons in Brook-street, where the sheriff of Middlesex constantly executes writs of inquiry in Vacation time, is a well known place to every practiser; but per Cur. the notice is not so certain as it ought to be, the inquiry and inquisition thereupon taken, must be set aside. Barnes's Notes in C. B. 214, 215. Trin. 10 Geo. 2. *Le Mark v. Newnham*.

25. Notice of executing writ of inquiry of damages at the Moot-hall in the Castle-Garth, without saying in what county, was held insufficient, and the inquiry set aside. Barnes's Notes in C. B. 216. Mich. 11 Geo. 2. *Lowes v. Smith in Northumberland*.

26. Defendant had obtained a judge's order for time to plead, pleading issuable, and taking notice of trial within term, or if he should not plead, taking the like notice of executing writ of inquiry. The time for pleading expired February 5, when defendant not pleading, plaintiff signed judgment; and February 7, gave notice to execute inquiry on the 8th. Defendant moved to set aside the inquiry for insufficiency of notice, urging, that the plaintiff ought to give as much notice as he could. Per Cur. plaintiff might have given notice on the 6th; short notice should be, at least, as much

as is sufficient to countermand a notice, viz. *two days*. Let the inquiry be set aside without costs. Barnes's Notes in C. B. 217. Hill. 11 Geo. 2. Butler v. Johnson.

27. Rule to shew cause why writ of inquiry, returnable on a general return (and not at a day certain, as it should have been, the proceeding being by bill) should not be set aside, discharged, because this is matter of error, appearing upon the record, and not irregularity; and whether it is helped, or no, by the statutes of jeofails, is not now the question. Barnes's Notes in C. B. 152. Mich. 12 Geo. 2. Elmes v. Tomlinson.

28. Motion to set aside inquiry for irregularity, notice being given to execute it at eleven o'clock, without naming any other hour; Cur. held it regular, provided it was executed before twelve; which appeared by affidavit. Court discharged the rule to shew cause. Barnes's Notes in C. B. 218. Mich. 12 Geo. 2, Laft v. Denny. [314]

(E. a) Writ of Inquiry. Executed. At what Time or Place, and what must be proved then.

1. **I**N trover and conversion of 40 loads of corn, the defendant as to 20 loads pleaded not guilty, and as to the residue, a special plea to which the plaintiff demurred, and it was adjudged for him; whereupon issued a writ of inquiry of damages; it was moved, that the writ of inquiry ought not to be, because *the issue was yet untried*; it was said on the other side, that it is in the discretion of the Court to grant such writ or not, which Wray granted, but said, it is *usual here to grant it presently*. Le. 141. pl. 197. Trin. 31 Eliz. Ward v. Blunt. Le. 178. pl. 251. S. C. but S. P. do not appear. Cro. E. 146, pl. 9. S. C. but S. P. does not appear.

2. A writ of inquiry may be executed on *the same day* on which it is returnable. Cro. E. 468. (bis) pl. 26. Pasch. 38 Eliz. B. R. Gawen v. Ludlow. See tit. Procefs (G) pl. 4. S. C. and the notes there.

3. In a quare impedit, where the writ of inquiry was of the value, it was executed on the day of the return; *but the jury did not give their verdict till two days after*; adjudged good. Cited per Cur. Cro. E. 468. pl. 26. Pasch. 38 Eliz. as the case of Buckler and the Queen. See tit. Procefs (G) pl. 5. and the notes there.

4. A writ of covenant was brought in London, and the breach was alleged in Hertfordshire; the plaintiff had judgment upon a nihil dicit. By the Court, and the prothonotaries said that, the writ of inquiry of damages, shall be awarded to London, and not to Hertford; for the action is laid in London; though the thing, in which the breach is alleged, was merely local, because damages only are to be recovered. As in trespass in London, the defendant pleads a release, &c. at Hertford, that shall be tried at London. And that is but a jury of office, whereof no attainit lies. Noy. 142. Smith v. Payter, Cro. J. 142. pl. 21. Mich. 4 Jac. B. R. Smith v. Batten. S. C. & S. P. and held the writ well executed in London; because the covenant is founded on a writing made in London, and adjudged accordingly. 5. Upon

Yelv. 151.
S. C. held
according-
ly. ———
Brownl.
214. S. C.
in totidem
verbis. ———
S. C. cited
Vent. 347.
in case of
Reve v.
Cropley.

5. Upon judgment in *trespass on non sum informat'* and a writ of inquiry, it was moved, that the writ should not be filed, because the plaintiff on the inquiry did *not prove that they were his goods*, but *only the value* of them, and a difference taken at the bar, between an *action confessed*, and a *non sum informat'*; but per Cur. both cases are alike, and the plaintiff is not bound to prove his property in either of them, for the writ commands the value only to be inquired of, and if the plaintiff should be bound to prove his property, and fail thereof, it would be in *destruction of the first judgment*, which cannot be. But it is otherwise where *not guilty* is pleaded, for then the trespass is denied, which must be proved and tried by the jury, and in that case both the value and property do come in question. Cro. J. 220, pl. 1. Pasch. 7 Jac. B. R. Goodwin v. Welch and Over.

[315] 6. Upon a writ of inquiry upon a *judgment by default* upon an *assumpsit* (if it be insisted upon) the plaintiff must *prove his debt*; for by the judgment the plaintiff is to recover; but *the quantum is to be inquired* into by the jury; and if the plaintiff is to recover, and if the plaintiff proves nothing, he must be content with a penny, or some such small matter of damages. 2 L. P. R. 67.

7. An *indeb. ass.* was brought for 20l. as executor to A. for so much of the said A's money, *had and received* by the defendant in his life-time; whereupon the plaintiff had *judgment by nihil dicit*, and upon a writ of inquiry, (the *plaintiff not being provided to prove the debt*, supposing it to be confessed by the judgment) the jury found but 2 pence damages. Ventris moved to set aside the writ of inquiry, for that the plaintiff was not obliged in this action to prove the debt at the executing of the writ of inquiry, no more than if he had brought an *action of debt*, cites Cro. J. 220. and Yelv. 152. Per Cur. this being in an *action upon the case*, which *lies in damages*, the debt ought to have been proved, and so let it stand. Vent. 347. Hill. 31 & 32 Car. 2. B. R. Reve v. Cropley.

8. Upon executing a writ of inquiry the *defendants having confessed* is not sufficient, but the plaintiff must prove the quantum and value. 2 Show. 86. Hill. 31 & 32 Car. 2. B. R. Hodder v. Saunders.

9. A writ of inquiry was *made returnable after the term*, but *was executed within the term*; and the Court inclined to amend it. Carth. 70. Mich. 1 W. & M. in B. R. Hammond v. Purcell.

10. If there be *demurrer to part*, and *plea to issue to part*, and *judgment upon the demurrer before the issue* tried, the plaintiff, if he pleases, may *enter a non prof.* upon the issue, and take a writ of enquiry of damages upon the judgment on demurrer, but it is not to be taken out till after non prof. entered on the other; for if they will proceed upon the issue, the jury that try it ought to inquire of the damages on the other; and here, because a writ of enquiry was taken out without entering of non prof. that matter was moved in bar of final judgment, and thereupon it was stayed till they moved of the other side. Per Cur. 12 Mod. 558. Mich. 13 W. 3. Anon.

11. If

11. If plaintiff delay the executing a writ of inquiry, till a year after the interlocutory judgment he cannot do it after without a *sci. fa.* Per Holt Ch. J. 12 Mod. 500. Pasch. 13 W. 3. How v. Acton.

12. In this case it was held that in all superior courts the judge sends his precept to the sheriff to enquire of damages, but in London [and] in all other inferior courts, an inquest is summoned in Court, and the Court takes the inquisition of damages. 3 Salk. 400. pl. 1 Salk. 130. pl. 14. S. C. but S. P. does not appear.

2. Mich. 1 Ann. B. R. East v. Estington.

13. After a judgment by default for the plaintiff and a writ of inquiry brought, it was moved that it might be executed before the Ch. J. at the sittings at Guildhall in London, the action being brought for 20000l. and a rule was made accordingly. 8 Mod. 240. Pasch. 10 Geo. East India Company v. Ellis.

14. Plaintiff had given notice of executing a writ of inquiry at St. Albans, Com' Hertf and both parties attended with counsel and witnesses on May 2, 1739. But when the under-sheriff was about to execute the writ, he perceived it to be returnable last term, and would not proceed. Defendant moved for costs upon affidavit of great expence, and had rule to shew cause. Upon shewing cause it was urged for the plaintiff, that this Court had never yet given costs for not proceeding to execute writs of inquiry according to notice. And this is a meer mistake; plaintiff was disappointed as well as defendant. Per Cur. though there has been hitherto no rule for costs in this court, yet notices of inquiry stand upon the same reason as notices of trial, and the Court of King's Bench grants costs in both cases; and were this a common case, costs could not be granted; but it appearing that the inquiry was returnable long before the day appointed for the execution thereof, let the plaintiff pay costs; it is not reasonable the defendant should suffer by the mistake of the plaintiff's attorney, and let a general rule be drawn up, that costs be paid for the future where inquiries are not executed pursuant to notice. Barnes's Notes in C. B. 152. Pasch. 12 Geo. 2. Kettle v. Bromfall.

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15. Plaintiff executed a writ of inquiry; whereupon the jury found no damages; and plaintiff executed a second writ of inquiry without quashing the first. And on the second the jury found a half-penny damages. Defendant moved to set aside the execution of the second writ, and had a rule to shew cause, which rule was made absolute; the Court being of opinion that the second writ was irregularly issued, the first pending, and not returned. Barnes's Notes in C. B. 154. Trin. 13 Geo. 2. Bunting v. Teafdale.

(F. a) Inquiry of. New Writ granted; or necessary; in what Cases,

1. **W**ASTE was brought by J. Archdeacon of D. of the lease of his predecessor; the process issued to the sheriff to inquire of the waste, and he made return. The original was, A a 2 That

That the defendant fecit wastum in tenementis, which J. S. predecessor of the plaintiff, leased to the defendant ad exheredationem ipsius archidiaconi, but did not determine if the waste was in the time of the predecessor, or in the time of the plaintiff, and the writ of inquiry of the waste was quod venire fac. coram te twelve &c. qui querentem nulla affinit. attingant, and did not say eundem querentem nec defendantem nulla affinitate attingunt, and therefore ill; for in this writ the sheriff is judge and officer, and the party may challenge, and have attain; for which default, and because it is not expressed in the original, nor in the verdict, if the waste was in the time of the predecessor, or in the time of the plaintiff, therefore mention was made in the Roll of those matters by special entry, and another writ awarded to inquire of the damages, and those matters specially put in the writ; quod nota. Br. Waste, pl. 58. cites M. 2 H. 4. 2.

Ibid.
Rhodes J.
cited S. P.
held according
to the
dower
brought by
the Countess
of Derby.

2. In *trespass* by a poor woman for breaking her close, *continuando* for six years. Upon a writ of inquiry, the jury found only 10s. damages; whereas the land was worth 4l. a year; and thereupon the moved the Court for a *melius inquirendum*, but it was denied; for so there might be infinite inquiries. But it is sometimes granted upon the motion of the defendant, where the damages are excessive, or some misdemeanors are alleged in the plaintiff, but never to the plaintiff, because the suing forth the writ is his own act. 2 Leon. 214. pl. 272. Mich. 30 Eliz. C. B. Anon.

3. In an *assise of novel disseisin*, the disseisin was found, and damages taxed by the recognitors; the disseisor, after this verdict, and before judgment, cut down timber to the value of 10l. the recognitors may be re-assembled to increase the damages. By all the fages of the law. I understand this case to have been before the recognitors were discharged by the Court, and the verdict entered. Jenk. 6. pl. 9.

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4. The Court was moved for a new writ of inquiry into London, and to stay the filing of a former, because of *excessive damages*, but it was denied. 1 Mod. 2. pl. 3. Mich. 21 Car. 2. B. R.

8 Mod. 196.
Parrv. Purbeck.
S. P.
— Ibid.

5. A new writ of inquiry was granted, where the damages given were *unreasonably small*. 2 Show. 20. pl. 203. Pasch. 34 Car. 2. B. R. Creswick v. Saunders.

213. Parrv.
Niblett. S. P.
— Ibid.

— 2 Le. 214. pl. 272. S. P. but denied to be granted, for so there might be infinite inquiries. Anon. — Rhodes J. cites the Countess of Derby's case, in dower, Ibid.

6. In all cases where attain would lie against the petit jury for excessive damages, there, if no damages be assessed, such an omission shall not be supplied by a new inquiry. 12 Mod. 12 Mich. 3 W. and M. Germin & Ux' v. Orchard. cites 11 Co. 119. a.

8 Mod. 197.
Arg. cites
S. C. and
the Court
looking
upon the
first jury's
giving small
damages to

7. In *covenant to pay 100l. and that upon default the covenantee might enter and take the profits*; the defendant pleaded entry and *prizal del profits in bar*, and judgment was for the plaintiff upon demurrer; and upon the writ of inquiry the jury gave damages; and upon motion a writ of inquiry was awarded; for debt might have been brought upon this covenant, it being to pay a sum certain;

certain, and this is not like an issue where the jury are to give no more damages than are proved. But here the jury are to give the whole, unless the defendant proves something in mitigation, which was not done in this case; therefore, though the common rule holds, that no new trial, or new writ of inquiry, shall be for too small damages; yet there being a contrivance in this case, it differs. 2 Salk. 647. pl. 17. Mich. 10 W. 3. B. R. Anon.

be a contrivance of theirs, awarded a new writ; yet they held the common rule to be as in the

principal case, and said, that otherwise this inconvenience might follow, viz. that the small damages given by the first jury, might influence the second jury to give greater.

8. In an action of *covenant for non-payment of rent reserved* upon a lease for years, there was judgment against the defendant by default; and upon a writ of inquiry executed, *the jury gave the plaintiff but 1s. damages*, and no more, *though he proved that the defendant owed him 150l. for rent*. The reason why the jury gave 1s. and no more, was, for that *the defendant took this lease of the plaintiff of a certain piece of ground, in which he (the lessee) covenanted to pay so much rent; and the lessor covenanted, that he should have such a sewer, or dam, to keep water, he (the lessee) intending to set up a paper-mill, but the commissioners of sewers had made the water-course so narrow, that he could not have water sufficient for his purpose; and being unwilling to sue the lessor upon this covenant, he let the land to the lessor; and thereupon another person entered, and was possessed thereof, and set up a corn-mill, and the miller paid the rent; and all this being known to the jury, who were of the neighbourhood, they gave the plaintiff 1s. and no more*. The Court was of opinion to set aside this writ of inquiry; for though the supposed breach of covenant (on the plaintiff's side was true) viz. that the defendant had not sufficient water to set up his paper-mill, and that had been given in evidence to the jury on the writ of inquiry; yet they could not have mitigated the damages on that account, much less when it was not given in evidence. It is true, the lessee left the land for that reason; and another entered and possessed it, *which entry, &c. might have been given in evidence upon the trial of an issue joined, but not to a jury upon a writ of inquiry after a judgment upon a demurrer; neither did the defendant give it in evidence to the jury, but pretends they knew it themselves*. 8 Mod. 196, 197. Mich. 10 Geo. Parr v. Purbeck.

(G. a) In what Cases a Writ of Inquiry may be [318]
awarded after Reversal and Judgment Quod Recuperet and the Record remanded; and out of what Court.

1. **A.** brought trespass against B. in B. R. and upon demurrer upon the plea of defendant, it was adjudged for defendant. But that judgment was reversed in the Exchequer Chamber in error, *Cro. J. 208. 11. Pasch. 6. Jac. B. R. Aldow v. Ridge. S. C.*
A a 3 but

states the demurrer to be upon the replication, and adjudged for the defendant, and that judgment reversed, and adjudged, that the plaintiff recuperet, and the record remanded; and the law intends that execution shall be done upon the record remanded, and that all shall be done which appertains thereto; so that a writ of inquiry of damages is to be awarded, which being returned, there is to be a second judgment, that the plaintiff shall recover the damages found; and adjudged accordingly.——Yelv. 74. S. C. but S. P. does not appear.

In the case of Faldow v. Ridge, the Court of Exchequer Chamber after the reversal, &c. gave judgment *quod querens recuperet*, &c. But because they wanted power to award a writ of inquiry, which was necessary in that case, being on a demurrer, and therefore it was sent back into B. R. for the execution of that writ, and thereupon to give final judgment for him. Carth. 181. Hill. 2 & 3 W. & M. in B. R. in case of Philips v. Bury.

But it is otherwise where the judgment is against the plaintiff in B. R. upon a special verdict, and that judgment reversed in the Exchequer Chamber, for in that case there being no writ of inquiry requisite, the Court of Exchequer Chamber does not only give judgment of reversal, but a complete judgment for the plaintiff in the action (viz.) *Quod recuperet*, &c. and for this difference the cases (marked * infra) were cited. Carth. 181. in S. C.

* D. 343. 373. 4 Inst. 72. Yelv. 118. F. N. B. 19. (D). 2 Saund. 224. 234. 235.

2. And if judgment had been given in trespass in C. B. for defendant, and reversed in B. R. such course should have been taken, as if the first judgment had been given against the defendant. Cro. J. 206. pl. 1. Pasch. 6 Jac. B. R. in case of Faldow v. Ridge.

3. If judgment be given against the defendant in King's Bench, and a writ of error be brought thereupon, and judgment reversed in the Exchequer Chamber, the Exchequer Chamber must give the interlocutory judgment, *quod quer' recuperet*, and this court award the writ of inquiry of damages; and so is Faldow and Ridge's case in Yelv. 74. 2 Cr. 206. 12 Mod. 153. Mich. 9. W. 3. Anon.

(H. a) What Damages may be given on a Writ of Inquiry.

Br. Damages, pl. 121. cites S. C.

1. **I**N a writ of inquiry of damages, the sheriff returned, that he had extended the land of which the disseisin was made at 26s. 8d. per annum, and that from the day of the disseisin, till the day of the inquisition taken, is a year and a half, and taxed the damages at 10l. Per Danby, the plaintiff shall recover the damages taxed, for though the land is worth but 26s. and 8d. per annum, yet it may be that the defendant has cut trees upon the land, or such like, so that in a year and a half upon such little land he might do 20l. damage, quod nota, good reason. Br. Brief de Enquire, &c. pl. 9. cites 7 E. 4. 5.

[319] 2. Where on writ of inquiry intire damages are given, and for part of which no damages could be given, that part shall be rejected as surplusage. 12 Mod. 157. Trin. 9 W. 3. West v. Cole.

3. Writ of error of a judgment in C. B. where the judgment was by default and damages separated by writ of inquiry, per Holt, if

If there be two plaintiffs, in many cases there may be judgment for one party, and non pros' entered for the other; and the judgment upon the non pros' is, *quod eat inde sine die*; but where the non pros' is only for part of the thing demanded it amounts to a release only for so much. 12 Mod. 384. Pasch. 12 W. 3. Stanhope v. Pegiberton.

4. In *covenant to pay the rent and maintain the tenements*, the plaintiff had judgment and a writ of inquiry issued, and was returned; it was assigned for error, that the said writ could not be a writ in this action, because it *recited all the facts in the present tense*, viz. that the rent *adhuc insolutus existit*, and the tenements *adhuc* are out of repair; whereas the action of covenant is only for rent in arrear, and tenements not repaired at the time of the original sued; but this *adhuc* in the writ of inquiry refers to the time of the *teste* of the writ of inquiry. Secondly, the plaintiff ought to recover only for the damages that he hath sustained at the time of the action brought; but here the jury upon the writ of inquiry, have given damages that the plaintiff sustained the bringing of the action, viz. until the writ of inquiry sued, which is erroneous, cites 2 Saund. 169. Hambleton v. Vere. Hob. 189. Harbin v. Green. Trin. 9. W. 3. B. R. Prince v. Moulton. But it was answered by the Ch. J. 1. That the writ of inquiry recited the declaration in *hæc verba*, which was well enough. 2. That it was not like the cases cited, where more damages were given than ought to have been given; because the jury in this case ought to give so much in damages as would repair the tenements, and put them into such condition, as they ought to be in, and damages also for the rent; and therefore if the tenements were become in a worse condition since the action brought, they ought to give damages for them. And the judgment was affirmed by the whole Court. 2 Ld. Raym. 802. Mich. 1 Ann. Shortridge v. Lamplugh.

5. A writ of inquiry was executed, and plaintiff moved to quash the inquisition by reason of the *smallness of damages*, which was denied. Where the jury find any damages, the inquisition must stand; aliter had they found no damages. Barnes's notes in C. B. 152. Mich. 10 Geo. 2. Burges v. Nightingale.

(I. a) What Things are to be inquired.

1. UPON the executing a writ of inquiry of damages in trespass for *digging a hole* in the plaintiff's soil, *whereby his land was over-flown, continuando transgressionem for nine months*; and it was insisted, that they might give evidence of a *consequential damage after the nine months*, as well as *in a nuisance* which continues for nine months, and the cause is removed, if the effect continues after, damage may be recovered for it; but Holt said, he was not satisfied that the parity would hold, for the *gist of the action in a nuisance is the damage*; and therefore, as long as there

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are damages, there is ground for an action; *but trespass is one intire act, and the very tort is the gist of the action*; and therefore he said, he doubted whether an action * would lie for the continuance of a trespass, as for that of a nuisance. Note, in writs of inquiry, the jury set their hands and seals to their verdict. 12 Mod. 519. Pasch. 13 W. 3. the case of the farmers of Hampstead water.

(K. a) What may be done in or about the executing a Writ of Inquiry.

1. **T**HOUGH defence be made upon a writ of inquiry, yet *it would not aid a judgment, if irregularly obtained.* Per Holt Ch. J. 11 Mod. 262. pl. 20. Mich. 8 Ann. B. R. in case of Taylor v.

(L. a) Inquiry of. In what Cases it must be by the first Jury, or not, and where by the Court.

1. **I**N dower, the tenant said that he has been ready at all times to render dower and yet is, and the demandant averred the contrary, by which she recovered dower, and for damages prayed the inquest to inquire of the damages, and could not have it; for this is an issue joined between the parties, which shall be tried by nisi prius; per Cur. Br. Enquest. pl. 79. cites 34 E. 3.

2. *Decies tantum*, the inquest found that one had taken 10s. and another 6s. and another a coat, price 40d. to the damage of ten marks, and because the damages were not severed, the Justices were in opinion to have taken inquest de novo; by which the plaintiff released the damages, and had judgment. *Quare*, if this is intended this inquest which gave the first verdict, or other inquest de novo. Br. Enquest. pl. 6. cites 44 E. 3. 36.

Br. Default, pl. 59. cites S. C. Brooke says, from hence it seems, that if trespass be brought against one alone, and he pleads to issue, and after makes default, that by this the issue is waved, and

3. In *trespass against several*, they pleaded at bar and are at issue, and at another term one of them made default, and writ was awarded to inquire of damages against him in order to continue the process against him and to avoid a discontinuance, *but this writ shall not issue till the issue be tried against the others*; for if it passes for the plaintiff against the others, then they shall assess damages for the whole, and then the writ of inquiry shall never issue; for the damages are tried against all by the inquest which passes upon the issue. But if the issue passes against the plaintiff, then the writ shall issue against him that made default, and so it was done by accord of all the Court. *Quod nota.* Br. Brief. de Inquier, &c. 8. cites 39 H. 6. 1.

writ shall be awarded to enquire of the damage, and where the first jury assesses damages, the second jury shall not assess damages ——— Br. Discontinuance de Process, pl. 25. cites S. C. ——— S. C. cited per Cur. 11 Rep. 6. a. ——— S. C. cited Roll. Rep. 30.

4. In *trespass*, the defendant *impaired* and at the day, &c. made default, and therefore writ of inquiry of damages was awarded, quod nota. Br. Default, pl. 72. cites 1 H. 7. 11. Br. Default, pl. 95. cites S. C.

* 5. And per Moyle, where two plead not guilty severally in *trespass*, and several *venire facias* are awarded, the inquest which first passes shall assess damages against all, and the second jury shall not assess damages, and there the other defendant shall be charged of the damages by the inquest, which passed upon the issue, to which he was no party, but he was party to the original, quod nota; and therefore may have attaint also, et non negatur, and in this case the second inquest shall not assess the damages, quod nota. Br. Brief de Inquier, &c. pl. 8. cites 39 H. 6. 1.

6. In *trespass* they were at issue, and *venire facias* returned, and at the same day the defendant confessed the action, and the inquest [was] at the bar, and by award of the Court this jury tried the damages, and no new writ, to inquire it, was awarded, quod nota. Br. Damages, pl. 227. cites 18 E. 4. 7.

7. An action of *battery* brought before the mayor of Plymouth, and not guilty pleaded; but afterwards the issue was waived and judgment was given for the plaintiff, and a writ of inquiry of damages was awarded to the serjeants at mace, returnable at the next court before the mayor and bailiff. Upon error brought, it appeared upon the record certified, that the writ of inquiry was executed before the mayor, who was also the judge of the court, and for that cause was reversed; for the writ warrants the inquiry to be made before the serjeants of the mace, who by the writ for that purpose are made distinct officers, and so an inquiry before the mayor was not warranted by the writ which was directed to other officers, and not to him. Brownl. 203. Trin. 3 Jac. Bailey v. Moon. Yelv. 69. S. C. in totidem verbis.

8. In an action of *trespass* against churchwardens, where by the statute 43 El. 2. If for a distress taken by them for money for the relief of the poor *trespass* be brought against them, and verdict pass for them, the defendants shall recover treble damages, with their costs, and that to be assessed, &c. by the same jury, or by writ of enquiry of damages; it was resolved, that treble damages are well assessed by the jury, though that it be not done by the Court; because the words are (by the same jury to be assessed) and not damages to be trebled by them. Noy. 137. Okeley v. Salter. Yelv. 176. Trin. 8 Jac. B. R. the S. C. agreed, and adjudged per Cur. that damages in this action for the defendants, by reason of the vexation,

shall be assessed by the jury, but shall be trebled by the Court, and that the Court thereupon may give costs de incremento; for no evidence for costs can properly be given to the jury, inasmuch as it depends on the usage of the Court in which the suit is. — And Ibid. says, that according to this judgment was the case Trin. 44 Eliz. B. R. Menial v. Ball.

9. If there be *demurrer to part*, and *plea to issue to part*, and judgment upon the demurrer before the issue tried, the plaintiff if he pleases may enter a non pros' upon the issue, and take a writ of inquiry of damages upon the judgment on demurrer, but it is not to be taken out till after non pros' entered on the other; for if they will proceed upon the issue, the jury, that try it, ought to inquire of the damages on the other. And here because a writ of

of inquiry was taken out without entering of non pros^t, that matter was moved in bar of final judgment, and thereupon it was staid till they moved of the other side. Per Cur. 12 Mod. 558. Mich. 13 W. 3. Sutton the marshall's case.

For more of Damages, see *Costs* and the several other proper Titles.

1. **T**HE king may grant writ of *warrantia dei* to any person which shall save his default for one day, be it in plea of land, or other action, and be the cause true, or not; and this by his prerogative, quod nota. Br. Prerogative, pl. 142. cites F. N. B. 7.

Where one is prisoner in a civil cause, and in execution. The course is upon motion to grant him a rule *ad loquend' cum consilio*, &c. and it was granted accordingly. Per Astry. Comb. 25.

2. It is against law to grant liberty to prisoners in execution, by other writs than day-writs; but they shall have as many day-writs as shall be needful for attendance on commissioners, to whom the cause being matter of account, was referred, and that without paying any fees, either for making, or sealing them. Chan. Rep. 67. 9 Car. 1. Rigault v. Cloberry.

3. No prisoner committed by B. R. ought to have the benefit of the day-rule of going abroad in term-time; for their imprisonment is their punishment for their contempt, or misbehaviour. 2 Show. 88, pt. 80. Hill. 31 and 32 Car. 2. B. R. The King v. Deane.

Going to Kensington on a day-rule was held an escape had it been well proved. 2 Show. 298. Cooling v. Glover, alias Ld. Purbeck's case.

4. One in execution had a *habeas corpus* from the Lord Keeper (which they call a day-writ) returnable three or four days after its teste. By virtue of this writ, he went to the Wine-Licence-Office, but never to any inn of court or Chancery, or to the Lord Keeper's, and this in the vacation. Per Pemberton Ch. J. this is a habeas corpus out of Chancery, which they may send at any time, and by virtue of the King's writ, the party was brought out of the prison-house, and that is justifiable. Then all the day, so long as there was a keeper with him, he was in custody still, and returning to prison at night, it is well enough, and no escape; though Chancery may examine the contempt, that is nothing to B. R. 2 Show. 298, pl. 299. Pasch. 35 Car. 2. B. R. Harwood v. Manlove.

5. A prisoner taken on an escape warrant before the sitting of the

the Court the same day, shall be discharged, if his name was entered with the clerk the night before; but not if it was entered the same morning only; and in the first case the prosecutor shall be committed. 8 Mod. 80. Trin. 8 Geo. *Wilkinson v. Matthews*.

6. *Entry of the name* in the petition for a day-rule, signifies little, unless it be read in court. 8 Mod. 240. Pasch. 10 Geo. *The King v. Dunbarr*.

For more of Day-Writ in general, see other proper Titles.

Deaf, Dumb and Blind.

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(A) How considered; and favoured, or not, in Law.

1. **I**N writ brought by a *feme*, the tenant pleaded that the demandant had nothing, unless in coparcenary with one Alice her sister, who is in full life, not named, &c. To which the demandant replied, that the said Alice was dumb and deaf, &c. by which the tenant passed over, and vouched, &c. *Thel. Dig. 6. Lib. 1. cap. 7. S. 4. cites Trin. 14 H. 3. Brief 877.*

2. A *feme dumb* sued *formeden* in proper person, and pleaded by *prochein amy*, but she always was in proper person. *Thel. Dig. 6. Lib. 1. cap. 7. S. 5. cites Mich. 10 E. 3. 536.*

3. A man dumb gaged his law of non-*summons*, and performed his law by signs. *Thel. Dig. 6. Lib. 1. cap. 7. S. 6. cites Mich. 18 E. 3. fol. 53. which book, Theloall says, agrees with Bracton, where he says, Lib. 2. cap. 5. fol. 12. Item nec surdus qui omnino non audit dare potest. Secus autem, si tarde audit, quia tunc potest dare. De muto autem, qui omnino loqui non potest id idem erit dicendum, possunt enim consentire (secundum quosdam) per signa & nutum.*

4. A man when he was of sound memory made and sealed a charter of feoffment and letter of attorney to deliver seisin, and before the livery by illness he became paralytick, so that he was dumb at the time that the seisin was delivered, but by all signs that a man could perceive he agreed to the livery of seisin, and adjudged a good feoffment. *Thel. Dig. 6. Lib. 1. cap. 7. S. 9. cites 25 Aff. 4.*

5. A

Deaf, Dumb and Blind.

5. A man, who *could neither speak nor hear* committed felony, and was arraigned, and therefore was commanded to prison. Br. Corone, pl. 216. cites 26 E. 3.

6. One was *indicted for the death of a man*, who could not speak nor hear, and the Court was in doubt what to do with him, &c. wherefore they thought that he should be remanded to prison. Thel. Dig. 6. Lib. 1. cap. 7. cites 26 Aff. 27.

7. *One who had made his will* and became ill, and (as it seems) had *lost his speech*, the same will was delivered into his hands, and it was said to him that he should deliver it to the vicar, if it should be his *last will*, otherwise he should retain it, and he delivered it to the vicar, and this was held a good will. Thel. Dig. 6. Lib. 1. cap. 7. S. 8. cites 44 Aff. 36.

8. A man deaf and dumb *a nativitate*, is non-compos, but otherwise, if *by accident*. But deaf, dumb, and blind by accident is non-compos. Per Wakering, reader of Lincoln's-inn, June 1626. cited D. 56. pl. 13. Marg.

9. It appears by oath, that the *defendant is both senseless and dumb*, and therefore cannot instruct his counsel to draw his answer; and therefore ordered that *no attachment*, or other process of contempt be awarded against the defendant for not answering, without special order of this court. Cary's Rep. 132. cites 22 Eliz. Altham v. Smith.

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See And. 209. that signs and other dumb motions are but conjectural.—Fin. Law. 8vo. 103. cites Perk. 5. that one born deaf and dumb may make a good grant, for divers may have understanding by their sight only, but that for want of sight, one born deaf, dumb and blind cannot grant.—Perk. S. 25. is, that he may make a gift if he has understanding; but he says, it is hard that such a person should have understanding. For a man ought to have his perfect understanding by his hearing, yet divers persons have understanding by their sight, &c. And a man born dumb and blind may have understanding; but a man that is born blind, deaf and dumb can have no understanding, so that he cannot make a gift or a grant.

10. One that is deaf and wholly deprived of his hearing cannot give, and so one that is dumb and cannot speak. Yet (according to the opinion of some) they may *consent by signs* and nods, but it is generally held, that he that is dumb cannot make a gift, because he cannot consent to it. Cow. Inst. 107.

11. If a *blind* man has understanding he may deliver a deed sealed by him. Jenk. 222. pl. 75. ad finem.

12. The lord shall have the *custody of a copyholder* that is deaf and dumb; for else he shall be prejudiced in his rents and services, and adjudged for the grantee of the lord against the prochein amy of the copyholder. Cro. J. 105. pl. 43. Mich. 3 Jac. B. R. Eavers v. Skinner.

13. A *dumb* man ordered to answer upon interrogatories by Mr. Colchester. Toth. 237. cites 14 Car. Harcourt v. Roberts.

And Bridgman Ch. J. cited the same, allowed per Warburton

14. One born deaf and dumb, who signified by signs that she understood what she was about to do, was allowed to *levy a fine* of lands by Bridgman. Ch. J. & al' Justices. Cart. 53. Trin. 18 Car. 2. C. B. Martha Elliot's case.

J. with consent of the other Justices, after having examined and found him intelligent, in one Hill's case. Ibid.—And per Archer J. If there be good intelligence such may make *freestants*.

fregments, and make contracts for their good. They are admitted on examination to marry, and on examination to receive the sacrament. Ibid. 54.

For more of Deaf, Dumb, and Blind, see *Ley Gager (K)*
and other proper Titles.

* Debt.

* Debt is what a man may recover by action, in his own use. Arg. 10. Mod. 163. cites Bract. lib. 3. cap. 1.

(A) For what Things it lies.

This in Roll is in folio 591.

[1. IF a man leases for years, reserving so many quarters of wheat yearly, an action of debt lies for the wheat, if it is arrear. Tr. 3. Ja. B. R. between the Lord Denny and Parnell, admitted and adjudged.]

S. P. Br. Debt. pl. 50. cites 50 E. 3. 16. and that it was held,

that the writ being in the detinet only, was good. — Thel. Dig. 113. Lib. 10. cap. 23. S. 14. cites S. C. — Ow. 32. Pasch. 7 Eliz. Anon. the Court held, that where a lease is made, reserving so many quarters of wheat yearly, and the lessor makes a lease of the rent corn, reserving a rent, that the reservation is good; for a man may reserve a rent upon a lease of rent, and the rent is not parcel of the reversion, but only incident thereto, and the lessor has the same inheritance therein, as he hath in the reversion.

[2. If two submit to an award, and they award a collateral matter [325] to be done, and not any money, no action of debt lies upon this award. M. 10 Ja. B.]

3. Debt against the executors of the clerk of the hamper, upon a writ de liberate currant, by the King, of receipt of the clerk of 100l. the plaintiff delivered sufficient acquittance, and that he shewed the liberate to the clerk anno 13, and offered acquittance such another day after, and the defendant said, that he was ready the same day to have paid it, if the plaintiff would have delivered acquittance; and the plaintiff demurred in law; and the Justices were in diverse opinions, if he be debtor without acquittance offered; but after, judgment was given for the plaintiff. See the book for the form of the declaration. It was held that the patent, by which the King had granted the debt, and the shewing of the liberate, made the clerk debtor, if he has assets enter mains, without shewing of the acquittance; and per Townsend and Hussey, the clerk ought to pay and demand acquittance; and yet it was agreed there, that the clerk shall not have allowance upon his account without acquittance. Br. Dette, pl. 136. cites 2 H. 7. 8.

4. If rent-corn be reserved upon a lease for years, and it is behind for two or three years, the lessor may have debt for the corn;

4 Le. 46. pl. 122. Anon. but and

S. C. in to-
sidem ver-
bis.

and shall make his declaration of so much corn, and the same shall be in the detinet; but yet he shall not have judgment to have corn, but so much money as the corn was worth, every several year being accounted; per Cur. 3 Le. 260. pl. 347. Mich. 32 Eliz. in the Exchequer, in Cheney's case.

5. A writ of debt properly lies where a man *owes* another a certain sum of *money by obligation*, or by *bargain* for a thing sold, or by *contract*, or upon a *loan made by the creditor to the debtor*, and the debtor will not pay the debt at the day appointed, that he ought to pay it, then the creditor shall have an action of debt against him for the same. F. N. B. 119. (G).

6. The lord may bring action of debt *for his fine against copyholder*; affirmed by two, and not denied; and Twisden said, that so it was held 15 Jac. by Foster J. which was not denied; but it was said the opinion of Bacon was *e contra*. Sid. 58. in pl. 26. in a nota there. Mich. 13 Car. 2. B. R.

7. Debt will not lie for a *wager*; adjudged per tot. Cur. Lord Raym. Rep. 69. Hill. 7 W. 3. Bovey v. Castlemain.

(B) Debt for Rent.

*Who shall have the Action, and against whom,
Who shall have it.*

[1. **H**E that is *privy in estate* shall maintain an action of debt for the rent.]

It was held by the Justices, that such grantee shall have debt for the

2. [If a man leases for years, rendering rent, and after *grants over the reversion*, and the tenant attorns, the *grantee* shall have an action of debt for the rent incurred after. Dubitatur, 9 H. 6. 16. b.)

rent; for the reversion comes to him lawfully. Br. Debt, pl. 140. cites 5 H. 7. 18. Ibid. in pl. 177. versus finem. S. P. and cites 4 H. 7. for the action of debt runs with the reversion. — 3 Rep. 22. b. 23. a. Hill. 29 Eliz. B. R. the S. P. in Walker's case.

[326] [3. So if he in *reversion dies*, his *heir* shall have an action of debt for the rent incurred after. * 14 H. 6. 26. Dubitatur pl. 122. cites 9 H. 6. 16. b.]

S. C. but I do not observe S. P. there. — Br. Rent, pl. 10. cites S. C. and by Cottington and Paston, the heir shall have the rent; for it is parcel of the reversion, and shall pass by grant of reversion, and yet it does not appear there that it was reserved to the lessor and his heirs, quod nota.

* Fitzh. Debt, pl. 30. cites 9 H. 6. 43. S. C. says it seems that he shall be put to his

[4. If the *baron leases for years the land of his wife*, rendering rent, and after the *feme dies*, he shall not have debt for the rent, incurred after, for his reversion is gone (and *semble* the lessee is become tenant at sufferance.) * 9 H. 6. 42. b. Contra || 14 H. 6. 26.]

action of debt; because the frank-tenement is in the heir without entry, and then the lease is utterly determined; and therefore it seems he cannot distress. — Br. Debt, pl. 7. cites S. C. says, that though the baron had never any issue by his wife, [and so was not intitled to be tenant by the curtesy,] yet action of debt lies by the baron against the lessee well enough, for rent incurred after the wife's death, till the heir enters; per opinionem Curie, quod nota.

|| Br. Debt, pl. 122. S. C. the lease was of lands which the wife had in dower, and held, that after

after the wife's death the baron shall have the rent, per Jayne; for the tenant had the occupation of the land for the rent, during the life of the feme, and consequently what incurred during the feme's life, the second baron shall have; for the tenant had quid pro quo; but the heir cannot have it ut videtur.——Br. Rents, pl. 10. cites S. C.

[5. But if a feme, having a rent for life, takes husband and dies, the baron shall have debt after the death of his wife for the rent incurred during the coverture. 10 H. 6. 11. 12.]

Fitzh. Debt. pl. 33. cites S. C. and whether she had the

rent by the way of dower or otherwise, it is all one; per Bab. & Cott. For the baron had frank-tenement in the rent, during his wife's life, &c.——F. N. B. 121. (C) S. P. and in Marg. cites S. C.——See tit. Baron and Feme (H) pl. 1. S. C. and the notes there.

[6. If baron and feme join in a lease for years, rendering rent of the land of which the wife is seised for life, and after the feme dies within the term, it seems the baron shall not have the rent, because the reversion is gone. My Reports, 14 Ja. between * Smalman and Agborrough, per Curiam. Contra, 9 H. 6. 26.]

Fol. 59a.
* See pl. 4. 5. supra and the notes there.

7. Debt lies for successor or heir in some case, as where a man grants an annuity and for default of payment to forfeit 40s. nomine pœne; the heir or successor shall have the action of debt; for it goes with the annuity. Br. Dette, pl. 86. cites 7 H. 6. 19.

8. It was held, where one leases his manor for term of years, that the lessee shall have action of debt against the tenants of the manor, after the term ended, for their rents arrear within the term. Thel. Dig. 19. Lib. 1. cap. 21. S. 8. cites Mich. 19 H. 6. 42.

9. The lord who has the reversion by escheat, and the lord who enters for alienation in mortmain, and the lord who claims the reversion by the purchase of his villein, shall have action of debt for the rent arrear. Thel. Dig. 19. Lib. 1. cap. 21. S. 6. cites Pasch. 5 H. 7. 18.

Br. Debt, pl. 140. cites S. C. and same point held by the Justices accordingly.

10. If the lord grants his feignory for years, the grantee during the years shall not have action of debt. 7 Rep. (39) 38. b. cites 9 H. 7. 17. a.

11. But how assignees and grantees at this day shall have actions see the statute made anno 32 H. 8. cap. 14 & 37. And by those and by the statute 27 H. 8. of uses, divers persons who were strangers and not privies before this statute, now are enabled to avow, and to maintain actions in diverse cases. Thel. Dig. 19. Lib. cap. 21. S. 9.

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12. Lessee for years makes feoffment of it to B. Yet lessor shall have action of debt against lessee on the first contract. D. 4. b. Marg. pl. 1. & 5. a. Marg. pl. 5. Mich. 25 H. 8.

13. Lessee assigns part, the assignee enfeoffs B. The question was, if the lessor (the reversion being out of him) might have debt before he had recontinued the reversion. D. 4. b. pl. 1. But in the margin 5. a. pl. 6. saith that he had heard that it was adjudged that the action lay upon the first contract.

14. It was said by Anderfon, and agreed by the Court, that if a man grants an annuity out of land, and has nothing in the land, that yet this shall be good to charge the grantor in a writ of annuity; and in the same case it was also agreed by the Court, that if

if a man grants an annuity to a woman, who takes a husband, and after arrearages do incur, and the wife dies, so that the annuity is determined, that the husband shall have an action of debt for the arrearages by the common law. Snuttleworth said this is remedied by the statute of arrearages of rents, and then at the common law it is but a thing in action. Peryman said an annuity is more than a thing in action. Windham said he may grant it over, and so the opinion of the whole Court was, that debt was maintainable. Goldsb. 30, 31. pl. 1. Mich. 29 Eliz. Selenger's case.

15. *Lessor for years grants the rent.* Lessee attorns; debt lies for grantee without his having the reversion; per Cur. the *attornment makes privity*; and judgment for the plaintiff. 2 Jo. 1. Mich. 22 Car. 2. B. Goodman v. Packer.

16. An action of debt lies against a returning officer at elections for 500l. penalty upon the statute for not delivering a copy of the poll to the candidates, being required. MS. Tab. May 3d, 1718. Smith v. Phillips.

(C) Debt for Rent. *Against whom it lies.*

* Br. Debt, pl. 8. cites S. C. [1. IF *lessee for years grants over* his term, an action of debt lies *against the grantee for rent incurred after.* * 9 H. 6. 52. b. 10 H. 6. 11. b.]

[2. [So] if *lessee for life*, rendering rent, grants over his estate, and after dies, debt lies against the grantee for rent incurred after the grant. 10 H. 6. 11. b.]

* 4 Rep. 49. b. cites 26 E. 3. 640. a. b. Loring's case. S. C. & S. P. [3. If *feme lessee for life takes husband, and dies*, debt lies *against the husband for rent* issuing out of the land *incurred during coverture*; for he took the profits out of which the rent issued. 10 H. 6. 11. Curia. * 26 E. 3. 64. adjudged.]
adjudged accordingly; and that there it is held, that after the death of the Baron, the action of debt in such case will lie against his executors.

[4. If an annuity was granted by a bishop before the statute of 1 Eliz. and confirmed by the dean and chapter, and after arrearages incur, and the bishop dies, an action of debt lies for the arrearages against the successor. Tr. 10 Ja. B. between Edwards and the Bishop of Ely

[328] 5. *A. leased Bl. Acre and Wh. Acre to B. rendering 20l. rent. B. granted Wh. Acre to W. M. who made a feoffment thereof to J. S. Afterwards A. brought an action of debt against B. for the rent arrear.* The question was, whether the action lay or not, or whether the reversion of Wh. Acre must not first be recontinued. The case was argued but no judgment. D. 4. b. pl. 1. Trin. 24 H. 8. in Cam. Scacc. Rushden's case.

8. C. cited 3 Rep. 24. a. as adjudged accordingly. 6. *B. leased three acres of lands to H. for years rendering rent. H. leased one acre to W. Then B. granted his reversion to C. who brought debt against H. for the intire rent; it was adjudged that*

that the action did well lie, because the intire estate remained in part of the land, and so the intire privity and action remains for the whole, against the first lessee, and that so is Ryfden's case. [D. 4. b. 5. a.] 24 H. 8. & 2 Aff. 52. And judgment for the plaintiff. Cro. E. 633. pl. 30. Mich. 40 & 41 Eliz. B. R. Broom v. Hore.

7. Debt against two administrators for rent behind after the death of the intestate, they pleaded that before the rent behind, they assigned the term to M. of which the plaintiff had notice, and accepted of the rent by the hands of the assignee. Adjudged per tot. Cur. that the plaintiff be barred. Mo. 600. pl. 829. Trin 41 Eliz. Marrow v. Turpin.

Cro. E. 715. pl. 39. S. C. adjudged accordingly. 131. pl. 99. S. C. adjudged, that the action

does not lie. — 3 Rep. 24. a. b. S. C. cited as held accordingly.

8. Where a man grants a rent charge for life, and the rent is arrear, and the grantor infeoffs A. of the lands, and the rent charge is in arrear in the time of A. and then A. infeoffs B. and the rent charge is likewise arrear in his time, and then the grantee of the rent charge dies, his executor shall have an action of debt against every one of them for the rent which was in arrear respectively in their times, because qui sentit commodum sentire debet & onus; resolved. 7 Rep. 39. Mich. 5 Jac. C. B. Lillington's case.

9. Debt for rent, the defendant pleaded that after the lease made to him, and before the action brought, he assigned over his term to J. S. and that the lessor had received of the assignee the rent which grew due after the assignment. All the Court resolved, that this assignment and acceptance of the rent from the hands of the assignee is notice of itself, and an agreement that he is his tenant, and then he cannot afterwards resort to the lessee to recover his rent of him, which was due after the assignment. Cro. J. 334. pl. 1. Hill. 11 Jac. B. R. March v. Brace.

2 Bull. 151. S. C. adjudged for the defendant.

10. After the determination of a rent charge debt does not lie against one person only that received a part of the profits of the lands, but it must be brought against all that had any part of the lands charged. Saund. 284. Trin. 21 Car. 2. Duppa v. Mayo.

(D) Debt.

The Gift of the Action.

In what Cases an Action of Debt lies, or Covenant.

[1.] IF in a deed sealed and delivered by A. it be recited, that whereas by obligation of such date, B. C. D. and E. stood bound in the penal sum of 160l. to the said A. for the payment of 86l. 18s. at a certain day, now this writing witnesseth, that he, scilicet, the said A. suscepisset & promississet to the said B. C. D. and E. in consideration of the sum of 40l. to the said A. paid by the said B. and C. in part of the said 86l. 18s. with interest and costs, not to prosecute the said B. C. D. and E. or any of them, in any action or process before such a day after the date of this writing, omnia

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quæ supra mentionata sunt per ipsum performari, & in defectu inde, vel alicujus rei inde mentionatæ sunt per ipsum performari, idem A. forisfaceret to the said B. and C. præd' summam 80l. If the said A. before the day mentioned in the said writing, sues the said B. C. D. and E. upon the said recited obligation, the said B. and C. only may have an action of debt upon this last writing for the 80l. for this is a distinct clause by itself, by which the 80l. is limited to be forfeited to the said B. and C. only; for it appears the 40l. was paid to him only by B. and C. so that it appears it was intended that the recompence should be forfeited to them also, though the promise by the first part of the deed was made to all four, upon which they might have had an action of covenant, but none præter the said B. and C. may have debt for the 80l. to whom the forfeiture is limited. Tr. 22 Car. B. R. between Harrison and Cheston, adjudged upon demurrer. Intratur, P. 21 Car. Rot. - - - -]

2. In some cases no action of debt lies on a covenant to pay money, as if A. covenants that his executor shall pay to B. within a year after his death 10l. Now because no action of debt lay against A. himself, it lies not against his executor, but only an action of covenant. Wentw. Off. Executors, 123. says, it was held so in Q. Elizabeth's time.

3. So if the covenant is conditional, as thus; viz. that if C. do not pay to B. 10l. then A. will pay it. Went. Off. Exec. 123.

4. So perhaps, if the covenant be in the disjunctive, viz. to do such an act, or to pay 10l. Now if the act be not done, yet debt lies not, but covenant only. Wentw. Off. Exec. 123.

5. A. by indenture leased lands to be for years, lessee covenanted to pay for the first year 6l. and afterwards 8l. per annum; after the first year, for arrears of the 8l. either debt or covenant lies. Cro. E. 797. pl. 45. Mich. 42 & 43 Eliz. B. R. Sicklemore v. Simmonds.

6. Debt lies not, but covenant, on a bill that ascertains the summe. Vide 2 Jo. 184.

7. The plaintiff declared that the defendant covenanted with him to pay him so much money as he should expend for repairing and victualling a ship for him, and avers that he expended 300l. in repairing and victualling it, and that he gave the defendant notice of it at such a day, and for non-payment he brings his action of breach of covenant. It was objected that in this case the plaintiff should have brought an action of debt, and not of covenant. But to this also, Roll answered, that it was well enough, for it is in the election of the plaintiff to bring either an action of debt, or an action of covenant, and that it has been heretofore questioned, whether an action of debt did lie in this case, but it was never doubted, but that an action of covenant did very well lie. Sty. 31. Trin. 23 Car. B. R. Anon.

8. An action of debt was brought for 1500l. upon a deed of charter-party. The plaintiff had a verdict. Roll J. said, either an action of debt, or an action of covenant lies here; for it is upon

upon a charter-party. Sty. 133. Mich. 24 Car. B. R. Frere's case.

9. Debt lies on any covenant, where the sum is reducible to a certainty. Per Windham J. cites F. N. B. which the Court agreed. 2 Keb. 225. pl. 80. Pasch. 19 Car. 2. B. R. in case of Birch v. Weaver.

10. If lessee assigns, and afterwards lessor accepts of the assignee for his tenant, he cannot afterwards maintain debt for rent against the first lessee, but he may maintain covenant against him. Sid. [330] 402. pl. 8. Hill. 20 & 21 Car. 2. B. R. And the Ch. J. cited it as so adjudged in 13 Car. 1. in Middleham's case, and so it was agreed now.

11. If A. covenants to pay B. so much as his part of the charge of a certain suit between the vicar of S. and the plaintiff touching a modus in the said parish, and which concerned all the parishioners, and B. brings debt upon this covenant and avers that B's proportion, or part amounts to such a certain sum, debt lies as well as covenant; for the damages, which before were uncertain, are by the averment reduced to a certainty. 3 Lev. 429. Mich. 7 W. 3. C. B. Saunders v. Marke.

12. Debt for rent is founded on the privity of estate, but action of covenant is founded upon the privity of contract; Arg. and seems admitted. 1 Salk. 82. pl. 3. Mich. 8 W. 3. B. R. in case of Woodward v. Marshall.

13. In debt upon bond, the defendant pleaded, that, since the last continuance, the plaintiff did by his deed grant and agree to and with the defendant to accept a bond for the building of a house in satisfaction of the first bond; and now it was held not to be a good plea, for it amounts to no more than a covenant, and not to a release. 12 Mod. 559. Trin. 13 W. 3. Baber v. Palmer.

14. Plaintiff agreed to sell the defendant so many stacks of wood, and the defendant covenanted to pay the plaintiff 35l. for every hundred of the said stacks, and bound himself in the penalty of 100l. to do it. It was held, per Cur. that the plaintiff may have debt or covenant at his election; for the rate being certain, viz. 35l. for every hundred stacks of wood, when the defendant has the wood, the agreement becomes certain, for which debt lies. 2 Ld. Raym. Rep. 814. Mich. 1 Ann. Ingledew v. Crippe.

2 Salk. 658.
pl. 3. Ingle-
don v.
Cripps. S. C.
but S. P.
does not
appear.—
7 Mod. 87.
Grips v.
Ingledew,
S. C. but
S. P. does
not appear.

(E) What will be a good Consideration to raise a Debt.

Fol. 593.

|| The Gift of the Action, scilicet, whether he shall have an Action of Debt, or Action upon the Case, or Covenant.

|| See tit.
Actions of
Assumpsit,
(N) per tot.

[1.] If a man promises another 20l. in consideration that he will marry his daughter, or cousin, this is a good consideration, and

Br. Dette,
pl. 204.
cites 15 E.
4. 22. co

tra per tot. and after marriage he shall have an action of *debt*. My Reports,
Cur. that 14 Jac. 17 E. 4. 4. b. 22 Aff. Placito 70.]
the action does not lie,

because the defendant has not quid pro quo, quod nota; but cites 31 E. 3. and 37 H. 6. fol. 8. to the contrary. — Br. Dette, pl. 117. cites 37 H. 6. 8. by the Justices that the action does not lie; for the
† discussing and remedy of the marriage, to make him marry her *lies in the Spiritual Court*, and
therefore the action for the money; and *so of legacies, contrary where tithes are leased or sold for*
10l. for there the *nature is changed*, contrary above, and so two Justices against two.

If a man *promise to pay to J. S. 100l. if he will take his daughter to wife*, debt lies of it;
contra if it be *promised in marriage* with the daughter, by reason of this term marriage. Br.
Dette, pl. 124. cites 22 Aff. 70. — S. P. and so in consideration of marrying a poor woman.
Arg. Roll. Rep. 433. pl. 21. Mich. 14 Jac. B. R.

† S. P. Br. Dette, pl. 160. cites 14 E. 4. 6. — S. P. Ibid. pl. 161. cites 17 E. 4. 4.

[331] [2. [So] if a man promises another 20l. in consideration that
Roll. R. p. he will *marry A. S. a stranger*. Debt lies for it after marriage.
61. pl. 4. Mich. 12 Ja. B. R. between Freeman and Freeman, adjudged
S. C. ad- that an action upon the case lies.]
judged. —

a Bullt 169.

S. C. adjudged for the plaintiff. — But both those Reports mention it to be an action on the case,
and not debt. — In such case debt lies; per Cur. All. 6. Mich. 22 Car. B. R. Obiter.

Cro. J. 521. [3. [So] if a man *says to a physician, or surgeon, that if he will*
pl. 4. Hill. *go to J. S. who is sick, and make him well and sound; he will give*
16 Jac. B. R. *him so much, &c.* Debt lies for the surgeon, if he makes him
Per Cur. well and sound. 37 H. 6. 9. per Moile.]
S. P. Obiter,
S. P. Br.
Dette, pl.

161. cites
S. C. [4. So if a man promises a physician, or surgeon, a certain
sum *to cure such a poor man*, an action lies if he cures him.
17 E. 4. 5.]

Br. Dette,
pl. 161. cites
S. C. [5. So if a man *promises a labourer* certain money *for repair-*
ing such a way, which is an highway, an action of debt lies.
17 E. 4. 5.]

[6. If *A. at the request of B. and for the proper debt of B.*
delivers money to T. S: to be repaid to A. by B. upon request,
A. may have an action of debt for the money against B. for this is
a plain contract between them, scilicet, that if he will pay at his
request a debt that he owes J. S. he will repay him. Mich.
18 Car. B. between Adrian Henrick and Inigo de Taffes comes
Quate adjudged per totam Curiam, this being moved in arrest of
judgment after a verdict for the plaintiff. Intratur, Tr. 18 Car.
Rotulo 366. and after affirmed in a writ of error in Banco Regis.]

[7. If I *promise J. S. a certain sum for the commons of J. D.*
an action of *debt* lies for it. 17 E. 4. 5. for the law intends that
J. S. is such an one, by whose service I have advantage.]

[8. If *A. buys of me certain cattle for a certain sum*, and *B. at*
the same time undertakes to pay it, if A. does not pay it at the day;
if *A. does not pay it*, yet debt lies not against *B.* for it sounds in
covenant. 18 E. 3. 13. it seems it is so to be intended.]

S. P. though
the house is
to be built
for another
person.
[9. If *J. retain a carpenter to build an house, and that he shall*
have 40s. for the doing thereof, an action of *debt* lies for the 40s.
37 H. 6. 9.]

Cro. J. 521. pl. 4. Hill, 16 Jac. B. R. Per Cur. Obiter. — S. P. Arg. Cro. C. 194. in pl. 4,
cites 37 H. 6. 10.

[10. If

[10. If C. recovers 10l. against A. and B. comes to C. and says, that if he will release the 10l. to A. that he will be his debtor, and he accordingly releases the 10l. to A. yet no action of debt lies, for that it sounds in covenant. 9 H. 5. 14.]

[11. If J. retain a counsellor for a year for 40s. Debt lies for this 40s. 37 H. 6. 8. b.]

[12. If a stranger comes to an attorney, and retains him to be attorney for J. S. in an action between him and J. D. and he is his attorney accordingly, he may well maintain an action of debt against J. S. for his fees, though this retainer by the stranger was maintainance in the stranger; for between J. S. and the attorney this is lawful, and so the consideration not against law. H. 38. El. B. R. between Truffel and Monflow adjudged upon demurrer.]

[13. If a solicitor of J. S. comes to an attorney de banco, and retains him to prosecute a suit in banco for the said J. S. against J. D. capiendo of the solicitor pro feodo quolibet termino 3s. 4d. ultra alias misas & expensas per ipsum circa prosecutionem sectæ præd' * deponendas; in this case an action of debt lies by the attorney against the solicitor for his fees and expences disburs'd in this suit, for that the contract is made between the solicitor and attorney, in the name of the solicitor himself, and not in the name of his master. P. 16 Jac. B. R. Rot. 416. adjudged in a writ of error between Woodhouse and Bradford. I have a copy of the record.]

[332]*
2 Roll. Rep.
76. S. C.
and judgment affirmed.—
+ Fol. 594.
Cro. C. 194.
S. C. cited
—See ult.
Attorney,
(R) pl. 8.
notes there.

Bradford v. Woodhouse, S. C. and the

[14. So if J. S. a stranger for any thing that appears by the record, comes to an attorney de banco, and retains him to prosecute a suit in replevin for J. N. the plaintiff, against W. S. the defendant, then depending in bank, capiendo de J. S. pro feodo & expensis, &c. as in Bradford's case before; in this case an action of debt lies by the attorney against J. S. because he made the contract in his own name, and it shall be intended that he shall have benefit by it, and it cannot lie in the conscience of the attorney how he is concerned that retains him. Contra, Tr. 6 Car. B. R. between Trevillian and Sands, in a writ of error, resolved per Curiam, against the opinion of Jones, that debt did not lie, but that he is put to his action upon the case, and they gave a peremptory rule for the reversal of the judgment; but this was afterwards stay'd, upon information that the parties were about a composition, which infratur. Mich. 4 Caroli. Rot. 96. I myself was of counsel with Trevillian the attorney.]

Cro. C. 107.
pl. 8. in
B. R. the
S. C. adjor-
natur. Ibid.
193. 194.
pl. 4. S. C.
in B. R.
adjudged,
that the first
judgment
be reversed.
And Rich-
ardson Ch.
J. of C. B.
being
moved
therein said,
that this
point was
never
moved be-

fore them; and that they were of the same opinion, that debt lies not, but only an action on the case.—S. C. cited All. 6 Mich. 22 Car. B. R. Roll. said, that the judgment was not reversed on the Roll, and that his opinion was, that the judgment was good.—S. C. denied to be law. 2 Show. 421. pl. 387. Hill. 36 & 37 Car. 2. B. R. and held, that the express promise will well raise an action; and the Ld. Ch. Justice said, that he thought Roll's argument in that case was not to be answered.—7 Mod. 148. Hill. 1 Ann. B. R. Arg. cites S. C. as adjudged, that an indebitatus assumpsit will not lie; and by Holt Ch. J. Ibid. 149. an indebitatus will not lie for being an attorney to a third person, because in that case his being an attorney on record, is what intitles him to debt; and therefore if another does promise to pay, yet he for whom he is an attorney on record, is not discharged, and therefore the other cannot in that case be liable to an indebitatus.

15. In debt the count was for 10l. upon vendition and for 100s. the residus which he had bail to re-bail, &c. and held good; for in debt and detinue the warrant of attorney and the essoin shall be in placito debiti. Theil. Dig. 84. Lib. 9. cap. 5. S. 29. cites Pasch. 32 E. 3. Brief 288.

16. If a man puts his cloth to the taylor, who makes of it a robe and does not agree for the price, the taylor shall not have action of debt. Otherwise it is of victuals and wine in a tavern; for there price is ascertained by the clerk of the market. Br. Dette, pl. 158. cites 12 E. 4. 9. per Bryan.

17. Debt does not lie for marriage-money; for the defendant who should render the money for the marriage of his daughter has not quid pro quo. Br. Contract. pl. 14. cites 15 E. 4. 32.

18. There is a diversity between debt and assumpsit. In assumpsit, it is not necessary that the contract to be eodem instante, but it suffices if there be inducement enough to the promise, and though it is precedent, it is not material; but in debt it is requisite that benefit come to the party, otherwise for want of quid pro quo debt lies not. D. 271. b. pl. 29. Marg. cites 28 & 29 Eliz.

[333] 19. Error of a judgment, where the plaintiff declares his debt for 256l. for several retainers to embroider several gowns; error assigned, because the plaintiff declares (inter alia) that the defendant retained him, such year, day, and place, to embroider a sattin gown for a maid servant of her daughters, and to take for it 40s. and the embroidering of another's gown, is no good consideration; but the Court held it to be a good consideration, in regard he did it at her request, and he may have debt or assumpsit. Cro. E. 880, pl. 11. Pasch. 44 Eliz. B. R. Shandois v. Simpson.

20. An action of debt brought for soliciting a cause in B. R. and it was a judged by the whole Court, that an action for debt for solicitor's fees, would not lie, but ought to bring an action of the case, and afterwards the Court held, an action of the case would not lie. Brownl. 73. Leech v. Phillips.

21. An executor brought an action of debt upon a promise made to the testator for bringing up of children and teaching; and after a verdict for the plaintiff upon nil debet pleaded, it was moved that debt would not lie in the case, because it was not laid that they were the plaintiff's children. But the opinion of the Court was for the plaintiff. All. 6. Mich. 22 Car. B. R. Hains v. Finch.

22. Debt will lie upon a promise made by a stranger, as in N. B. 122. K. If one promises money to another for marrying of a poor virgin; debt lies. All. 6. Mich. 22 Car. B. R. Haines v. Finch.

(E. 2) Consideration Good; though there is not Quid pro Quo.

1. IF I promise to J. S. 30s. to carry the corn of W. N. to D. and he does it, he shall have debt against me, and yet I have

have not quid pro quo, per Davers; and Danby agreed, that debt does not lie.—Per Moyle, if I retain a carpenter to make a house for 10l. who does it, action of debt lies, and if I *promise a surgeon 10l. to cure J. N.* and he does it, debt lies against me. Br. Contract, pl. 17. cites 37 H. 6. 8.

2. In debt, a man *seised in right of his wife sold 400 oaks for 20l.* and the vendee took 200 in the life of the feme; the feme died, the baron not being tenant by the curtesy, the heir entered, and the baron brought debt of 10l. For the vendee had paid the other 10l. in the life of the feme; and per tot, Cur. because the contract was good at the time of the bargain, and is intire, and cannot be severed, and he has part of the oaks, and might have taken all the 400 in the life of the feme, and did not, therefore it is his folly, and he shall render the intire sum. Br. Contract, pl. 26. cites 18 E. 4. 5.

3. But contra if a day of the cutting had been agreed, and he had not cut before such a day, and the feme died before the day. Debt does not lie, for he has not quid pro quo. Ibid.

4. If I take another man's horse and sell him for 10l. and the owner retakes him, yet debt lies of the 10l. for the contract was executed by delivery of the horse, et expectet emptor. Ibid. per Vavifour.

5. So per Littleton, if the horse dies in the stable of the vendor mesne between the sale and delivery. Br. Contract, pl. 26. cites 18 E. 4. 5.

6. But, per Brian J. fol. 22. if I sell a horse for 10l. I may retain the horse till I am paid, and yet I shall not have an action of debt, till the horse be delivered, and yet by the bargain the property is in the buyer. Ibid.

7. But if the buyer tenders the money, and the other refuses, there he may take the horse, or have an action of detinue. Ibid.

(F) Consideration passed.

[334]

[1.] **I** *promise my bailiff, upon his accounting to me, to pay him 5l. at a day certain for his service past*, this is no good consideration to maintain an action of debt, because the service was ended before. 29 E. 3. 26.]

[2. In an action upon the case, if the plaintiff declares, that the defendant was indebted to him 20l. pro parte pretii diversorum mercimoniorum & merchandizarum by the plaintiff to J. 8. being a stranger, at the instance and request of the defendant, ante tempus illud venditorum & deliberatorum, & pro quibus mercimoniis & merchandizis, the defendant ante tunc promiserat to the plaintiff, to see the plaintiff satisfied; & sic indebitatus existens, he promised to pay him at a certain day; this is no good consideration; for upon his own shewing, it appears that this was not any debt, nor could he have an action of debt for it, but only an action upon the case upon the promise, inasmuch as this is a collateral promise, and not in nature of a debt, for the debt was made upon the sale of the goods to J. S. and between them; and though this was at the re-

Stv. 6.
Ward v.
Coggin.
S. C. ad.
judged, and
error
brought,
and error
assigned,
but does not
mention
whether the
judgment
was re-
versed or
not.

quest of the defendant, yet this request, without more, did not make any debt in the defendant without the promise, which was made at another day; and though the request was sufficient, with the promise, to maintain the action upon the promise, yet this did not make it a debt in the defendant; and also, this is but a conditional promise, scilicet, that if the said J. S. did not pay, that he himself would. Tr. 22 Car. B. R. between Cogan and Green, adjudged, per Curiam, this being moved for error upon a judgment in banco; which intratur in banco. Tr. 21 Car. Rot. 390. and now the first judgment was affirmed.]

(G) Where Debt lies.
The Gift of the Action.

4 Rep. 49.
a. Hill. 29

Fol. 595.

Eliz. C. B.
in Ognell's

case, S. P.

[1. **FOR** arrearages of rent of a freehold, during the time of the continuance of the freehold, debt does not lie. 6 H. 4. 7. b. adjudged. 19 H. (*) 6. 29. 47. 17 E. 3. 48, 72. b. 39 E. 3. 22. agreed. Contra, 38 E. 3. 10. admitted. Contra, 26 E. 3. 64. admitted.]

8 Ann. cap. 14. S. 4. Enacts, that it shall be lawful for any person, having rent due upon any lease for life, to bring an action of debt for such arrears, as upon a lease for years.

[2. Where a man may have annuity, he shall not have an action of debt. 8 H. 6. 6. b. agreed.]

Roll. tit.
Annuity,
(A) pl. 1.
cites 7 H.
6. 19. b.
S. P.

[3. If a man grants to another 10l. every year he shall be resident within such a parish, the grantee cannot have debt for it, but an annuity, for this is annual at his will. 4 H. 6. 91. b. 8 H. 6. 7.]

[335]

[4. If a man makes a feoffment in fee, reserving a rent for ten years to him and his heirs, debt lies for this rent, for it is but a chattel.]

[5. So if a man leases for life, rendring a rent for one year, debt lies for it, for this is but a chattel.]

Co. Litt.
217. a. cites
S. C. and
that Heile
Ch. J. of
C. B. gave
the rule,
that during the term the lessee had only for years, and therefore the action of debt is maintainable.

[6. So if a man leases for ten years, rendring 10l. rent to him and his heirs, upon condition to have a fee, and if he performs the condition reserving 20l. per annum; though the fee passes presently, yet it seems debt lies for the rent before the condition performed, for before that it is but a chattel. 7 E. 3. Det. 147. adjudged.]

Where com-
position is
made of
tithe of an
annuity in

[7. If an annuity be granted and a nomine pœne every day that it is arrear, if the nomine pœne be forfeited, debt lies for it. 20 H. 6. 6. Contra, 8 H. 6. 6. b. Dubitatur, 7 H. 6. 40.]

perpetuity in fee simple, between the parties and their successors, and for default of payment a penalty, debt lies of the penalty, though the annuity be real and inheritance, quod nota. Br. Dette, pl. 66 cites 11 H. 4. 85. by the best opinion.—S. P. Br. Dette, pl. 201. cites S. C. and 7 H. 6. 19 39. And per Skene, if rent charge be granted to me, and if it be arrear that I shall have such a penalty, I may distrain for rent, and also for the penalty; quære inde, for it seems that he cannot unless the deed express that he may distrain for both.

8, If

[8. If by prescription the burgesses of a town ought every year to elect a man to collect the rents of the lord, and that he ought to pay to the lord 22s. for the profit of the market, an action of debt lies for every 22s. by the lord, for that though this be an inheritance, yet it is a particular duty by every collector. 11 H. 6. 14. b. is, that the executor of the lord shall have an action.]

[9. Debt lies for the arrearages of the rent of a freehold, scilicet, for life, after the estate determined. 10 H. 6. 11. 11 H. 6. 15. 19 H. 6. 25.]

for term of his life certain land, rendering 20l. per ann. the reversion to the plaintiff, and surrendered to the plaintiff, saving his action of the arrearages. And per Kirton, he has not shewn of whole lease he holds, and yet has brought debt of 20l. of the arrearages of the rent, judgment of the count, quære inde; for it was not denied, but that the action of debt well lies. Br. Dette, pl. 38. cites 38 E. 3. 10.

Debt of 20l. and counted that the defendant held to him

[10. If a man takes a seignioresse to his wife, who dies, the baron shall have debt for relief fallen during coverture. 10 H. 6. 11. b.]

11. Where annuity granted per auter vie, or for years expires pending writ of annuity thereof or before, he shall not recover by writ of annuity, but is put to the action of debt. Br. Dette, pl. 203. cites 34 H. 6. 20.

12. If a man loses his goods and J. S. finds them, and after sells them to the first owner in market overt for certain money, quære if the vendor be barred in action of debt for the money or not; for the sale seems to be void; for the promise was never out of the owner; for if the disseisor comes upon the land and infeoffs the disseisee, this is a void feoffment and remitter. Br. Property. pl. 27. cites 7 E. 4. 15.

13. In debt, where a man is bound to appear upon writ at a certain day, it is no plea that the writ is not returned, for he may have special entry of his appearance, but it is a good plea that the bailiff to whom he is bound kept him in prison till the day of his appearance; for he shall not gain a forfeiture by his own act. Br. Dette. pl. 109. cites 9 E. 4. 23.

14. If a lessor borrow of his lessee for years 20l. and after by deed indented between them, the lessor grants, that his lessee should recoupe the rent until he should be paid the 20l. the lessee cannot here have a writ of debt for the 20l. because he had estopped himself by deed indented to be contented another way, viz. by way of recouper of his rent. But otherwise it is, where a man owes me 20l. and I grant to him by indenture that he may levy the money of my goods. Here he has his election, whether he will bring a writ of debt, or levy it of my goods. Keilw. 112. b. 113. a. Casus incerti temporis. Anon. cites 2 R. 3. pl. 15. S. P.

15. P. granted an annuity of 5l. per annum to B. for two years, payable at Michaelmas, or within sixteen days after; in debt for this 5l. plaintiff declared, that it was in arrear at Michaelmas, et adhuc arretr exisset; defendant demurred, it was insisted, that debt lies not for this annuity during the two years but a writ of annuity; but per Cur. debt lies, it being a grant for years; for it is by the deed

But in Crd. E. 3. pl. 7. Hill. 24. Eliz. Tona field's case, it was agreed by all the just.

deed as a contract. Cro. E. 268. pl. 4. Hill. 34 Eliz. B. R. *Brown v. Pendlebury*.
 tices in C. B. that grantee of an annuity for years cannot have an action of debt for the arrearages, during the term in the annuity.

16. If goods be pawned for money, and the goods be demanded and detained, whereby the whole property is in the pawner; there the party who had the pawn may maintain debt for his money. Per Fleming Ch. J. and not denied. Yelv. 179. Trin. 8 Jac. B. R. in the case of *Ratcliffe v. Davis*.

17. So if goods perishable in their nature be pawned, and they do perish of their own accord, then debt may be brought for the money. Per Fleming Ch. J. and not denied. Yelv. 179. Trin. 8 Jac. B. R. in case of *Ratcliffe v. Davis*.

18. For the arrears of an annuity for years an action of debt lies, but not for the arrears of an annuity for life, or in fee. Bulst. 151. Trin. 9 Jac. in case of *Lucas v. Fulwood*, alias Ward. Arg. cited to have been so adjudged.

19. If lessee for years grants annuity for years to another, debt lies for it; per Yelverton J. Bulst. 151. Trin. 9 Jac. in case of *Lucas v. Fulwood* alias Ward.

20. Lessor for years, rendering rent, granted the rent; the lessee attorned; the grantee of the rent brought an action of debt against the lessee for rent arrear after the attornment; and upon demurrer it was insisted that this action of debt would not lie, because there was no privity, the reversion being still in the lessor; but per Curiam, the attornment made a privity, and judgment for the plaintiff. 2 Jo. 1. Mich. 22 Car. 2. *Goodman v. Packer*.
 Lev. 28. Patch. 13 Car. 2. B. R. *Robins v. Cox*. S. P. exactly, and the Court divided, whereupon it was adjourned into the Exchequer Chamber, but on the publishing of the case of *ARDS v. WATKINS*, in Cro. C. 637. 651. where it was adjudged, that such action was maintainable; the parties before any argument in the Exchequer Chamber agreed, and the rent was paid without any more ado.

[337] (H) Where Debt lies in Respect of the Estate by Matter subsequent.

Br. Debt, pl. 93. cites S. C. & S. P. though the tenant attorns. Per Paslon.
 [1. IF the rent of the very tenant be arrear, and after the lord aliens the seignior, yet he shall not have debt for the arrearages, because the freehold of the rent continues. 19 H. 6. 42. b.]

Br. Debt, pl. 93. cites S. C. & S. P. Per Paslon, attorns, yet he shall not have debt for the arrearages, because the freehold of the rent continues. 19 H. 6. 42. b.]
 for these are the acts of the party himself.

But if I have annuity or rent service to [3. If a parson bath an annuity in fee, and leases it to another for years, and after arrearages incur, the lessor shall not have an action of debt during the years for the arrearages so long as the estate of inheritance

inheritance of the annuity continues. Mich, 1649, between *Tintal and Harrington, adjudged in arrest of judgment. Intratur 1645. Rot, 1612.]

me and my heirs, and I grant it for years to J.S. and the annuity or the rent service is arrear, and the term expires, J. S. shall have debt. Br. Debt, pl. 93. cites 19 H. 6. 41. Per Afcue. — [The Year Book is of an annuity granted by me to B. and his heirs, and by B. granted to J. S. for years, and the annuity, &c. being arrear, the term expires, the termor shall have writ of debt, (says the old edition, but the new edition says detainee,) and yet the annuity continues; and so of the rent service, notwithstanding the franktenement continues in me. 19 H. 6. 41. a.] * Sty. 168. S. C. it was moved, that he ought to have brought a writ of annuity, and cited 6 H. 4. 7 & 9 H. 6. 94. The judgment was arrested till the plaintiff should move.

[4. If a *prebend* hath an *annuity in fee* in the right of his church, and after arrearages incurred he *resigns*, he shall have debt for the arrearages, because the person of the grantor was at all times chargeable before in annuity, and now the *manner of the action is changed into debt for necessity.* Dubitatur, 19 H. 6. 41. b.] Br. Debt, pl. 93. cites S. C. Per Fulthorpe, and Paston, that debt does not lie, but Afcue and Newton contra. And Brooke says, that the best reason as it seems that the action does not lie, is, because it was the folly of the plaintiff himself. — 4 Rep. 48. b. 49. b. cites S. C.

[5. So if a *parson* hath an annuity, and he is *deprived*, he shall have debt for the arrearages due before. 19 H. 6. 42. b.]

[6. So he shall have debt for the arrearages after a recovery against him and the patron in a *quare impedit.* 19 H. 6. 42. b.]

[7. If *lessee for life of a rent acknowledges a statute*, and after releases to the *tertenant*, and then the *statute is extended*, and after the rent is arrear, the *tenant by the statute* shall not have an action of debt for the arrearages during the extent; for though in truth the freehold is extinct by the release, yet as to him it is in esse, otherways the extent lay not; and during the continuance of the freehold, debt lies not, though the tenant, by the statute, hath but a chattel, for this is derived out of the freehold. Hill 4 Jac. B. between Duncombe and Lillington, per Curiam.] Fol. 596. 7 Rep. (38) 37 Mich. 5 Jac. C. B. Lillington's case, S. C. resolved accordingly.

[8. The *very lord* shall not have an action of debt for aid to marry his daughter, or make his son a knight. Co. Lit. 47. 6.]

[9. [So] The *very lord* shall not have an action of debt for relief due to himself, for this is part of his seigniori, and he may distrain for it. Co. Lit. 47. b.] [338] S. P. But contra of his executors,

for they may have debt of it; for it is not annual. Br. Dette, pl. 193. cites 7 H. 6. 13. Per Rolfe. And administrator of a lord brought action of debt of the relief, which fell in the time of the intestate, and the defendant pleaded in barr, and therefore it seems that it lay clearly; for he did not demurr. Br. Dette, pl. 198. cites Trin. 38 H. 8. Rot. 588. — Co. Litt. 83. a. ad finem. S. P. — Kelw. 133. a. pl. 111. Per Kebble, e contra, because it is only an acknowledgment to be made to the lord after the ancestor's death, and is not of the same nature as the rent is; for a man cannot have a *præcipe quod reddat* of it as he may of the rent; besides, it is not annual but a casualty, which perhaps the lord may not have in all his life. — Dal. 17. pl. 6. Anno 1 & 2 P. & M. by the greater opinion, the lord himself may have action of debt for relief, because it is not annual as other services are. — 4 Rep. 49. b. that the lord himself shall distrain, and shall not have action of debt, and cites 7 H. 6. 13. and 22 Aff. 58. — See tit. Tenure (N. a) per totum.

[10. [So] The *very lord* shall not have an action of debt for escheage due to himself for the cause aforesaid. Co. Lit. 47. b.]

[11. If a *rent be reserved upon a lease for life*, after the death of the *lessee*, debt lies for the arrearages before; for now the *freehold* B. Debt, pl. 93. cites 19 H. 6. 41. is

S. P. Per is determined, and it is *changed into a contract*. 10 H. 6. 11. Fulthorp. 11 H. 6. 15.]

* Br. Debt, [12. So if a lease be for the life of another, and *cestuy que vie* dies after the rent incurred. 19 H. 6. 41. b. * 39 E. 3. 22.]

[but the other editions are 89 E. 3. 22.]

S. P. by Fulthorp, J. Br. Debt, pl. 93. cites 19 H. 6. 41.—S. P. Br. Debt, pl. 90. cites 19 H. 6. 29. but makes a quare if an occupant enters where lessee himself dies, if he shall not render the rent, and says, it seems he shall by distress, but not by action of debt, during the life of *cestuy que vie*.—Br. Debt. pl. 195. cites 9 H. 6. 29. [and the other editions at pl. 195. (the number only varying) cites 9 H. 6. 29. but it seems it should be 19 H. 6. 29. per Paston.—All the editions are (devant) which seems misprinted for (durant.)]

In case of a condition of re-entry for non-payment of the rent, the re-entry is the cause of the action, [13. But if a lease be made for life, rendering rent, upon condition for non-payment to re-enter, and detain till the arrearages paid; if the lessor re-enters for non-payment, he cannot, during his seisin have debt for the arrearages before, because the freehold remains in the lessee, and the lessor hath it but in nature of a distress, Contra, 30 E. 3. 17. adjudged.]

which cannot be by the condition without deed, for before the re-entry he cannot have debt; for it was then frank-tenement, and now by the estate being determined, debt lies. Br. Debt, pl. 16. cites 29. [but it should be 39 E. 3. 22.]—Br. Debt, pl. 93. cites 19 H. 6. 41. Per Fulthorp J.

S. C. cited [14. Contra, 30 E. 3. 7. adjudged; but *this matter of the freehold is not intended*; but there in the same folio is another case of Co. Litt. 203. a. S. P. Contra that a lease for years, and it seems this is the same case with the other, he shall not have debt, and therefore says, year.)] and so the other is *misprinted*, in that it calls it a lease for life; (but Fitzherbert abridges this case to have been a lease for a year.)] that the book [of 30 E. 3. fol. 7. which he cites in the margin] which seems to the contrary, is false printed, and that the true case was of a lease for years, as appears afterwards in the same page of the leaf.

Br. Debt, [15. If lessee for life, rendering rent, does waste after arrearages pl. 93. S. C. due, and the lessor recovers in an action of waste, he may have an action of debt for the arrearages, because the estate is determined by lawful action to avoid his disinherittance. 19 H. 6. 42.]

[339] [16. So if such lessee aliens in fee, and the lessor enters for a forfeiture, he may have debt for the arrearages. 19 H. 6. 42. b.] Br. Debt, pl. 93. S. P. cites S. C. Per Fulthorp, J.

* S. P. Br. Debt, pl. 83. cites 38 E. 3. 22. [and Roll. 42. * 39 E. 3. 22. agreed.] [and Roll. 42. * 39 E. 3. 22. agreed.] seems misprinted.] [17. So if a lease for life be upon condition, and the lessor enters for breach of it, he shall have debt for the arrearages. Dubitatur. 17 E. 3. 48, 73. b. but 18 E. 3. 9. adjudged. Contra 19 H. 6. 42. * 39 E. 3. 22. agreed.]

18. So if lease for life be made rendering rent and lessee surrenders. F. N. B. 120. (G) in the new notes there (b) cites 17 E. 3. 48. 18 E. 3. 10. 30 E. 3. 7. 38 E. 3. 10. contra by some; 19 H. 42. for the re-entry is not a penalty, so of nomine poenae. And says, see 38 E. 3. 22. 19 H. 6. 42. 6 H. 7. 3.

19. If a man leases land for years and the rent is arrear, and a stranger

stranger recover the land against the lessor, yet the lessor shall have debt, per Newton. Br. Dette, pl. 93. cites 19 H. 6. 41.

20. Where *rent is arrear, and the lessor distreins, and the tenant for life surrenders and sues replevin*, the lessor may make avowry, but quære of debt; it seems all one, if he shall have the avowry he may have debt; for it is his own act to take the surrender. Br. Dette, pl. 93. cites 19 H. 6. 41.

21. Where *a thing determines by the act of God*, action of debt will lie, though it did not lie before, and so it is where it determines by *course of law*. But otherwise, where it is by the act of the party himself. 19 H. 6. 42. a. per Fulthorp. Br. Debt, pl. 93. cites S. C.

22. If a man *sells twenty acres of land for 10l. the vendor may have writ of debt, though he has not enfeoffed the other of the land, and the other has no remedy but by action upon the case*; for it his folly that he had not taken better surety to have been enfeoffed, quod non negatur. Br. Action, Sur le Case, pl. 60. cites 22 H. 6. 44.

23. If *annuity of fee be extinct* debt lies of the arrears. Br. Debt, pl. 121. cites 37 H. 6. per Prisot.

24. Debt lies *for the lord of a lease made by his bailiff*, per Moil J. quod non negatur. And Choke J. that a bailiff may lease at will, for he is accountable to the lord. Br. Dette, pl. 146. cites 2 E. 4. 5.

25. If a man *grant an annuity for years*, the grantee shall have writ of annuity as long as the years continue, and after the years expired he shall have *debt of the arrears*; for he has no other remedy. Br. Dette, pl. 144. cites 9 H. 7. 17. Br. Annuity, pl. 13a. cites S. C.

26. So where a man *grants a feignory for years*, the grantee may make avowry during the years, and after the years shall have debt of the arrears for the cause aforesaid. Ibid.

27. Action upon the case, that the defendant *assumed to the plaintiff, that if the plaintiff discharged J. T. of such execution, in which he is at the suit of the plaintiff, that then if the said J. T. does not satisfy the plaintiff by such a day, that then defendant shall do it*, and counted accordingly, and they were at issue upon non-assumpsit, and the evidence to the jury in proof of the assumpsit, and the truth of the matter also was, *that the defendant assumed to the plaintiff's wife, in the absence of the plaintiff, and when he came to his wife he agreed to it and discharged J. T. without speaking with the plaintiff*, and per tot. Cur. upon good argument the action upon the case lies; and by the best opinion, for he shall have action upon the case, and not writ of debt. And by some he may choose the one or the other. Br. Action Sur le Case, pl. 5. cites 27 H. 8. 24, 25.

28. *In most cases a man shall have action upon the case, when he may well have other remedy, but this seems that it is in another degree.* Ibid. [340]

29. *As where a man is indebted to me, and he promises to pay before Michaelmas, I may have action of debt upon the contract, or action of the case upon the promise, and so this is in diverse respects,*

spects, for upon the promise action of debt does not lie. And this in B. R. Ibid.

30. Where a man *grants an annuity to J. S. during the life of the grantor*, and the annuity is *arrear* and the *grantor dies*, the grantee himself shall have action of debt of the arrears of the annuity, because the annuity is determined. Contra when the annuity continues, as it seems. Br. Dette, pl. 191. cites Vet. N. B. Annuity.

31. If a man *leases lands for years* rendering rent, and for default of payment, that he shall re-enter; if he do re-enter into the land for non payment of the rent, yet he may have an action of debt for the rent, for which he does re-enter, and in the writ shall *recover the rent for which he re-entered*. F. N. B. 120. (H.)
3 Rep. 29. b. cites S. C. and 30 E. 3. 7. and 6 H. 7. 3. b. contrary to the book of 38 E. 3. tit. Barr. 26a. (which is not law,) and this is in respect of the contract between the lessor and the lessee.—See Kelw. 133. b. pl. 1. Mich. 1 H. 8.

32. If a man *leases land for term of years* rendering rent, and afterwards the rent is behind, and the *lessee surrenders* his term, yet the lessor shall have an action of *debt for the arrearages before*, as it seems by P. 38. E. 3. tamen quære, for the opinion is contrary to 2 H. 6. F. N. B. 122. (A)

(I) Executor. Pl. 1. 2. 3. 5.

[Baron after Death of the Feme. Pl. 4.]

[Lessee for Years after the Term expired. Pl. 6. 7.]

[1.] *If a rent becomes due to the very lord*, and after *he dies*, his executor shall not have debt for this rent, because the rent continues a freehold in the heir. 11 H. 6. 15. 19 H. 6. 41. b.]

Executor
may have
action of
debt for relief
due to the lord.

[2. The executor shall have debt *for relief fallen* in the life of the testator. 11 H. 6. 15. Co. Lit. 47. b.]

See all the books cited at (H) pl. 9. which are full as to this point.

Co. Litt. 47.
b. S. P.

[3. The executor shall have debt *for escuage, aid pur faire fitz chivalier, & pur file marrier* due in the life of the testator.]

[4. The baron shall have debt *for relief fallen* in the right of the feme during the coverture after the death of the feme. 10 H. 6. 11. b.]

Fol. 597.
See (K) pl.
9. S. C.

[5. If there be a *custom that a town ought yearly to choose a man to collect the rents of the lord*, and to pay 22s. to him for the profits of his fair, if there be 22s. due by a collector, and after the lord dies, his executor shall have debt for it. 11 H. 6. 14. b. Dubitatur. (So it seems the lord himself might.)]

[6. If the *grantee in fee of an annuity grants it over for years*, and after the *term expires*, the lessee shall have debt for the arrearages, though the annuity continued of inheritance, because the estate of the lessee is determined, and so he hath no other remedy,
and

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and the person of the tertenant was chargeable before. 19 H. 6. 42.]

[7. *So lessee for years of a manor, after term expired, shall have debt for the arrearages, because he hath no other remedy, yet the inheritance continued.* 19 H. 6. 42. 9 H. 7. But *quære* the reason thereof.]

8. If *parson* or *prebendary dies*, his executors shall have *debt for the arrearages of an annuity*, incurred in the life of his testator, because the person of him that ought to pay the annuity is chargeable in writ of annuity. 4 Rep. 49. a. in Principio. Hill. 29 Eliz. C. B. per Cur. in Ognel's case. F.N.B.120.
(L) S. P.

(I. 2) Pleadings in Debt for Rent.

1. **D**EBT upon a lease for years, rendering rent payable at another county, than where the land is, and no distress in the indenture, yet he distrain, and there levied by distress upon the land and so he owes him nothing is a good plea. Br. Vilne, pl. 19. cites 44 E. 3. 42.

2. In debt for rent against lessee for years, if payment in another county, or levied by distress be pleaded, he shall conclude, and so he owes him nothing. Br. Debt, pl. 27. cites 34 H. 6. 17.

3. A lease was made of tithes paying rent with a proviso, that if J. S. the lessee, attempt or prosecute any action against A. B. who pretended a former lease made to him of the same tithes, and if upon such action a verdict should pass against J. S. the lessee, that then the rent should cease. In debt on a bond entered into by the lessee for performance of covenants the breach assigned was non-payment of rent; J. S. the defendant pleaded, that A. B. enjoyed the tithes by virtue of his former lease, so that the defendant could not have and enjoy them according to his lease, and so there were no covenants to be performed on his part; upon demurrer the opinion of the Court was against the defendant, for the rent is payable until a verdict should pass, &c. Dy. 318. b. pl. 11. Mich. 19 Eliz. Anon.

4. If in debt for rent, the plaintiff declares upon a lease for years rendering 31s. yearly at Lady-day and Michaelmas by equal portions, and demands 15s. 6d. for rent behind for one year ending at Lady-day last, the declaration is naught; for the demand of the 15s. 6d. being for the arrears of the rent of the whole year, it ought to have been shewed how he was satisfied the residue; and for this cause after a demurrer to the defendant's plea the writ was abated. Cro. C. 137. Trin. 4 Car. Bailey v. Hughes.

5. Debt upon bond for performance of covenants in a lease; the defendant pleads performance, the plaintiff replied, and assigned a breach for non-payment of rent on such a day, *secundum formam et effectum conditionis obligationis præd'*; the defendant rejoins and alleges an entry by the plaintiff on the lands leased before the rent due, and that he kept possession till the rent-day was past; and found for the plaintiff; it was moved in arrest of judgment on the plaintiff's

tiff's replication, it being that the defendant did not pay the rent secundum formam & effectum conditionis of the bond, whereas there is *no mention of any payment of rent in the condition of the bond but in the lease only*; sed non allocatur; because the defendant by his rejoinder confessed that such rent was arrear, and waived taken issue upon it, but took issue on another matter, and so this is well enough after a verdict. And per Hale Ch. B. it is all one in substance to plead, as the plaintiff did, and to have pleaded secundum formam & effectum indenturæ; for the condition of the bond comprehends all that is comprized in the lease; but though it might have been a question upon demurrer, yet there can be no doubt of it after a verdict. Hard. 319. pl. 13. Mich. 14 Car. 2. in the Exchequer. Anon.

Sid. 423. pl. 2. S. C. but mentions the action to be brought for rent of the third year, and that the not averring the continuance of possession was aided after verdict.

6. Debt for rent upon a lease for a year, and so from year to year, quamdiu ambabus partibus placuerit; there was a verdict for the plaintiff for two years rent. Sanders moved in arrest of judgment, that the plaintiff alleges indeed, that the defendant entered and was possessed the first year, but mentions no entry as to the second. Per Twisden, the jury have found the rent to be due for both years, and we now intend, that he was in possession all the time for which the rent is found to be due. Mod. 3. pl. 10. Mich. 21 Car. 2. B. R. Gostwicke v. Mason.

7. In debt for rent upon a demise of a fishery to the defendant for three lives, the plaintiff in his declaration set out the demise, *virtute cujus the lessee entered, & fuit & adhuc est inde possessus*. The defendant pleaded *nil debet*, and there was a verdict for the plaintiff. And Serjeant Prat moved in arrest of judgment, that it appeared upon the declaration, that the estate for three lives was continuing, and therefore debt did not lie, it being a rent issuing out of a freehold. Serjeant Hooper, in answer, said, that this was well enough after a verdict, for that *nil debet* put all the matter in issue, and if the estate had not been determined, the plaintiff could not have had a verdict: and that that matter indeed was the greatest matter litigated at the trial, and therefore the continuing not appearing directly, the Court would take the estate to be determined. Pratt said, that the averment in the declaration of *the fuit & adhuc, &c.* was an express averment that the estate did continue; but if it were only indifferent, it would not be good; for the plaintiff ought to shew expressly in his declaration, that the estate for three lives was determined, or else he was not intitled to bring his action of debt, within the statute of H. 8. which was agreed by the Court, and the judgment arrested. 2 Ld. Raym. 1056, 1057. Mich. 3 Ann. Bishop of Winchester v. Wright.

Distress sufficient to satisfy the rent, is a good plea in bar to debt, for the rent. Per Tutton, J. 12 Mod. 663.

8. If a man distrains for rent and impounds the distress and then brings debt for the same rent, the defendant may plead *levied by distress*; per Holt Ch. J. 11 Mod. 144, Hill. 6 Ann. in case of Alton v. Jarvis.

9. In debt for rent the plaintiff declared on a demise by *mentionat existit*; this was held to be ill and not helped by defendant's pleading over. 11 Mod. 258. Mich. 8 Ann. B. R. Joddrell v. Heath.

*** (K) Where Debt, Covenant, an Action upon the Case, or Account lies, without Contract.**

[1. IF a man delivers money, upon condition to be his money, and that if it be not performed, that it shall be re-delivered; if the condition be not performed, the bailor may have debt for it, 41 E. 13. 10.]

In what cases an action on the case lies, where debt lies. See tit. Actions (N) Per totum. The bailor may have debt, or account. Br. Debt. pl. 223. cites S. C.

[2. If a man delivers 100l. in a bag unsealed to another, debt does not lie for it, because the property was never out of the bailor. 18 H. 6. 20. b.]

[3. If I have a rent out of land, and the tenant delivers it to another to pay to me, I cannot have debt against him for what he hath received. 6 H. 4. 7. b.]

[4. If a man delivers money to you to pay to me, I shall not have debt for it, because there is not any contract between us. 6 H. 4. 8.]

D. 21. b. pl. 131. Trin. 28 H. 8. S. P. Cro. J. 687. pl.

1. Trin. 27 Jac. B. R. the S. P. adjudged, that debt lay.

[5. If a man receives rent of my tenant by my command, I shall not have debt against him. 6 H. 4. 8.]

[6. So if he receives it of his own head. 6 H. 4. 8.]

[7. If a man by obligation acknowledges that he hath received a sum ad proficiendum & computandum, the obligee may have debt for it if he will. 42 E. 3. 9.]

Br. Debt. pl. 32. cites S. C.

[8. If a man by deed delivers certain money to another, to render an account thereof to him, he may have an action of debt for the money at his election. 28 E. 3. 98. b.]

[9. If there be a custom that the collector of the rents of the lord ought to pay 22s. to the lord for the profits of the market of the lord, the executor of the lord may have debt for the 22s. without bringing a writ of account, for he is not a receiver of this, but he ought to pay it, whether he receives the profits or not. 11 H. 6. 14. b.]

See (I) pl. 5. S. C.

[10. If a man delivers money to deliver to J. S. if he does not deliver it, yet J. S. cannot have a writ of debt against him. 19 H. 6. 5. b. 20 H. 6. 35. D. 28 H. 8. 21. S. 131.]

[11. So [But] if J. S. refuses the money, the bailor may have debt against the bailee for it. 19 H. 6. 35.]

S. P. Br. Debt. pl. 91. S. C. by

Fulthorp, J. For the bailee shall not retain the money by the refusal of a stranger; says, this seems to be good law; for the bailor may have debt or account, because there is privity.

[12. If a man by his deed acknowledges that he hath so much of the money of J. S. due to him in his hands, though here is no con-

tract or borrowing between them, yet J. S. may have an action of debt against him. 11 H. 6. 39.]

[13. If I deliver money to another to repay at a certain day, debt lies for it at the day. 29 E. 3. 26. b.]

[14. [So] if I deliver money to B. to keep safely, I may have an action of debt against B. for it. 2 R. 3. 15. D. 28 H. 8. 22. S. 137.]

[344] [15. If A. by my command pays money to B. to my use, and B. does not pay it to me, I may have debt for it against him. 36 H. 6. 9. b.]

Fol. 598.

[16. If a man leases for years, rendering rent, and after devises the rent to another, and dies, the devisee may have an action of debt for the rent, though it is become a rent-seck, because by the original creation thereof debt lay. Mich. 11 Jac. B. R. between Holland and Hunt, per Houghton.]

* Hob.
226. pl. 260.
S. C. re-
solved ac-
cordingly.
—Hutt.
11. S. C.
but not re-
solved.—
Noy. 22.
Spark v.
Richards.
S. C. the
Court held,
that action
of debt lay
on such re-
turn.—Mo.
886. pl.
1244. S. C.
adjudged—
Brownl. 51.
S. C. the
action well
lay.—
Hutt. 32

[17. If a sheriff levies certain money upon a *levari facias* out of a recognizance at the suit of J. S. and after returns the writ served, J. S. may have an action of debt against the sheriff, as well as a *scire facias*, or *fieri facias*, though there be not any actual contract between the sheriff and him; for this is a contract in law, scilicet, the levying the money to the use of J. S. Hill. 15 Jac. B. between * Speak and Richards, per Curiam, adjudged. Hobert's Reports, 279. the same case. Pasch. 15 Car. B. R. between ¶ Parkinson and Culliford, adjudged per Curiam, that an action of debt lay against the executor of the sheriff though it did not appear that the *fieri facias* upon the judgment was returned; for it is not material, inasmuch as the party is discharged by the payment thereof, without the return; and it is not grounded upon a personal tort, but upon a contract in law made by the testator, upon the receipt of the money; and this is not a simple contract, but grounded principally upon the record, so that the executor cannot wage his law, and therefore the action lies against the executor. Adjudged, this matter being moved in arrest of judgment.]

Trin. 16 Jac. cites S. C. as adjudged accordingly.

¶ Cro. C. 539. pl. 3. Parkinson v. Gifford. S. C. all agreed, that the action well lay, and judgment was given nisi, &c.—Jo. 430. pl. 2 S. C. adjudged by three J. (absente Brampton,) that either account or debt lies at the plaintiff's election; and that it lies against the administrator.—Mar. 13. pl. 33. S. C. and all conceived that the action would lie.—See tit. Sheriff (L) per totum.

18. Debt lies in bank of an *amerciament* assessed in a *leet* by the best opinion of the Court. But *quære*, because it was not much argued. Br. Dette, pl. 179. cites 10 H. 6. 7.]

19. If I deliver money to A. to bestow in charity, and before he gives I countermand it, debt lies for me against him for the money; for the property is still mine. D. 22. a. pl. 135. Trin. 28 H. 8.

20. B. retained R. to be miller to his aunt at 10s. a week; adjudged that debt lies not upon this, but action on the case; for in debt it is requisite that the thing comes to the party that promises; and so for want of *quid pro quo* debt does not lie; but per Cur.

Cur. this maintains action upon the case; for though it be not beneficial to B. it is chargeable to R. Dy. 272. a. Marg. pl. 31. cites Mich. 26 & 27 Eliz. *Baxter v. Read*.

21. The words of an obligation were, *I am content to give to A. 10l. at Michaelmas*. Held that debt or covenant lies at the election of the plaintiff. 3 Le. 119. pl. 169. Mich. 27 Eliz. B. R. Anon.

22. Y. was an innholder in a great town in the county of S. where the sessions used to be holden, and the defendant was a gentleman of quality in the country there, and he in going to the sessions used to lodge in house of the said Y. and there took his lodging and his diet for himself, his servants, and horses, upon which the debt in demand grew; but the said Y. was not at any price certain with the defendant, nor was there ever any agreement made betwixt them for the same. It was said by Anderson Ch. J. that upon that matter an action of debt did not lie. And therefore afterwards the jury gave a verdict for the defendant. 3 Le. 161. [345] pl. 210. Hilh 29 Eliz. C. B. *Young v. Ashburnham*.

23. Case for that in consideration, he on such a day, &c. had contracted with and by his bill of articles had bargained and sold unto the defendant and his heirs a messuage, the defendant promised to pay the plaintiff 300l. on such a day, which he had not paid; and upon demurrer it was adjudged, that this action would not lie, because in this case he might have an action of debt; and where a man may have an action at common-law (as debt is) an action upon the case will not lie. 2 And. 53. pl. 39. Trin. 38 Eliz. *Wade v. Branch*.

24. A. delivered 16l. to B. to keep for him the said A. and to be re-delivered and paid to the said A. upon his request; it was insisted that debt lay not, but accmpt; but adjudged that on B's refusing to pay it, upon A's request, debt did lie for A. against B. D. 20. b. Marg. cites 40 Eliz. C. B. *Bretton v. Barley*. Ow. 86. s. C. held accordingly.

25. A man made a lease for life rendering rent, and for non-payment to re-enter; and afterwards he brought an action of debt for the same and recovered. Ibid. 21. a. Marg.

26. A man delivers money to another to buy certain things for him, and he does not buy them, the party may bring an action of debt, but he said that the plaintiff ought to aver, that the defendant had not re-delivered them. Ow. 86. cited by Glanville as adjudged, Hill. 41 Eliz. in case of *Bretton v. Barnet*.

27. Walmsley took a difference between goods and money; for if a horse be delivered to be re-delivered, there the property is not altered, and therefore detinue lies. And if Portugal's or other money that may be known be delivered to be re-delivered, a detinue lies, for they are goods known; but if money be delivered it cannot be known, and therefore the property is altered, and therefore debt will lie. Ow. 86. Mich. 41 & 42 Eliz. *Bretton v. Barnet*.

28. A. gives money to B. to buy wares, and B. does not buy them. Debt was maintained for the money. D. 20. a. pl. 119.

in Marg. cites it as a case cited by Glanvil. Mich. 41 & 42 Eliz. as adjudged.

29. *A. delivered a horse to B. with orders to sell him for 3l.* Adjudged that *debt* did not lie, but an account for the horse and the profits. D. 20. Marg. pl. 120. cites Trin. 2 Jac. 1. Holcomb v. Sumwood.

30. *A. delivers money to B. to pay it to C. for the debt of A. A. himself afterwards paid the debt, and afterwards B. pays the money to C.* and it was ruled that an action of *debt* lies against C. for the last money, for the last payment was upon a tacit condition, if the debt was not paid before. Cited per Cur. Noy. 22. Trin. 15 Jac. C. B. in case of Spark v. Richards.

31. In all cases where the party who receives money, is to have any allowance or reward for the receiving thereof an action of account-render, and not an action of debt, or upon the case must be brought against him. L. P. R. 30.

32. An action of debt, or an action on the case upon an *in-fimul computasset* lies at the election of the plaintiff against one for receiving money of a third person for the use of the plaintiff, although he had no authority given him to receive it; Hill. 23 Car. 1. B. R. For it is the interest that the plaintiff hath in money paid for his use, that gives him the cause of action, and it is a receipt of the money that makes the other party liable to the action, and it matters not by what authority he received it. L. P. R. 30.

[346] 33. An action of debt was brought against the defendant upon an *in-fimul computaverunt*, and a verdict and judgment given against him, whereupon he brought his writ of error, and assigns for error that the action was brought against him for rent as a tenant of land and not as a receiver, and therefore an account did not lie; Roll Ch. J. cited 20 H. 6. Rent alone lies not in account, because rent is a certain thing, and it is also the realty; but if rent be mixed with other things, an account will lie; but here it appears the action is brought against the defendant as a receiver, and if one receives money due to me upon obligation, I shall have either an action of account, or an action of debt against him, so if he receives my rents without my consent. Therefore let the judgment be affirmed. Sty. 287. Trin. 1651. Hamond v. Ward.

34. The nature of a debt is not changed by an account no more than accounting with an executor, but a specific promise to the husband to pay him a debt due to the wife *dum sola* may alter the debt. Sty. 473. Mich. 1655. Conie v. Lawes alias Lewis.

35. *I oblige myself to pay so much at such a day and so much at such a day*, covenant lies, especially if both days are not passed; but Ch. Bar. Bridgman doubted how the law would have been if the words were *teneri & firmiter obligari*, because those words found in debt and not in covenant. Hard. 178. Hill. 12 & 13 Car. 2. in Scacc. Norris's case.

36. *Indictments for clipping being found against W. he gave K., a Newgate solicitor 70l. to procure his discharge and for his pains;* and

and W. not being prosecuted on these indictments he brought an indebitatus assumpsit against K. for the whole 70l. Upon the trial before Holt Ch. J. it being proved that the defendant confessed that he had *disposed of this money in bribes*; the jury by direction gave a verdict for the plaintiff. *Ld. Raym. Rep. 89. Trin. 8 W. 3. Wilkinson v. Kitchin.*

37. If one covenants or *promises specially* upon receipt of goods to be accountable for them, if he will not account, action upon the covenant or promise will lie, and an action of account lies upon the *general receipt*. *Per Holt Ch. J. 12 Mod. 517. Pasch. 13 W. 3. B. R. in case of Spurraway v. Rogers.*

[K. 2.] *Debt. On Penal Statutes, though not expressed in the Statutes.]*

[18. [1.] **W**HERE by the *statute of 14 H. 8. cap. 5.* and the letters-patents of the King, it is enacted, *That every one that practises physick in London without license of the College of Physicians, shall forfeit for every month 5l. one moiety to the King, and the other to the college*; though no action is appointed for it, yet they have an action of debt for it. *Trin. 4 Jac. B. R. College of Physicians adjudged.]*

[19. [2.] An action of *debt* lies upon the *statute of 2 E. 6. for the treble value for not setting forth of tithes*, though the statute does not mention any action but only that he shall forfeit the treble value, and does not mention to whom he shall forfeit it, nor by what action it shall be recovered. *Co. Entries.* And this is now the common practice.]

[20. [3.] An action of debt lies by a *sheriff* upon the statute of 28 *E. 1. cap. 4. for his fees* given by the statute, *for an execution served* by him, though the statute does not say that he shall have his fees, or any action for them, but only says, that he shall not *take for any execution served any consideration or recompence besides that thereafter in the said act mentioned, which it shall be lawful to be had and received, scilicet, 12d. for 20s. where the sum does not exceed 100l. and 6d. where above 100l. 14 Jac. B. R. between Proby and Lumly, plaintiffs, and Mitchel, defendant, adjudged. *Intratur. Pasch. 14 Jac. Rot. 531.]*

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Mo. 853. pl. 1166. S. C. adjudged, and though the statute does not give any action for his fees, yet it being a duty, an action is given by that law of necessity.

ty.——Roll. Rep. 404. pl. 34. adjudged; and it was said, that there was no precedent of such action having been brought before.——Noy. 75, 76. S. C. cited as adjudged.——S. C. cited as adjudged. Poph. 173.——S. C. cited Lat. 51.——See tit. Fees, per totum.

(L) Upon an Account.

[1. **D**EBT lies upon an account *before himself.* 45 E. 3. 14. b. 7 H. 4. 14. b.]

[2. Debt lies for the arrearages of an account *against the bailiff of a manor.* 7 H. 4. 3.]

C c 3

[3. If

[3. If the *bailiff* of a manor accounts for the *issues* before they are *leviable*, an action of *debt* lies for the *arreages*, for he hath voluntarily charged himself with them. 13 H. 4. 12. b.]

[4. If upon the account of a *bailiff* of a manor, it appears, that he hath *paid more than he received*, he may have debt for this *surplusage*. 7 H. 4. 3.]

Br. Debt,
58. cites S.
C. and no

[5. If upon the finding the *surplus* the lord *promises to pay it*, the *bailiff* may have debt for it. 29 E. 3. 25. b.]
mention is there made of any promise of the lord, but only of his being over paid, and that in debt brought by the *bailiff*, the lord was compelled to answer.

[6. If a man accounts before auditors for a thing that lies not in account, as for a *contract*, debt lies not for the *arreages* of the account. 8 H. 6. 10. b. 15. b.]

Fol. 599.

Debt. 101.

arrears of account the plaintiff was examined, and found that it was for certain *stuff* bought of the plaintiff, and for this he had accounted before auditors, and because it did not lie in account, he was commanded to amend the count, or the defendant shall be dismissed, by which he declared upon a *contract*. Br. Debt, pl. 89. cites 8 H. 6. 19. But in such a case the same year, fol. 15. the plaintiff would not amend his count, by which the defendant made his law immediately.

[7. If a man accounts against another as receiver to a stranger, if the defendant be found in *arreages* before auditors assigned, debt lies not for the *arreages* upon the account, because it appears that he is not accountable to the plaintiff. 20 H. 6. 6.]

[8. But in an account as receiver of the plaintiff, if the defendant be found in *arreages*, debt lies for it upon the account, though in fact he never was his receiver. 20 H. 6. 6. b. contra.]

[9. Debt lies against executors upon the *arreages* of an account by the executor himself, of receipts by the testator. 2 H. 4. 13. b.]

[10. And the Court in this case may be of receipts in general, without mentioning the particulars, because the defendant was party thereto. 2 H. 4. 13. b.]

Roll. Rep.
87. pl. 38.
S. C. ad-
judged.—
2 Bull. 277,
278. S. C.
adjudged.

[11. In a writ of account against another as receiver, if the defendant be found before auditors in *surplus*, yet he shall not have debt against the plaintiff for it, inasmuch as he is charged as receiver, and not as *bailiff*, for a receiver shall not have any recompence of his travel, &c. Mich. 12 Jac. B. R. between the Earl of Suffolk and Floyd, adjudged upon demurrer.]

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12. Debt by executor, and counted how a stranger by his will had devised 100l. to the testator of the plaintiff, which came to the hands of the defendant, who recited by indenture that it came to his hands, and that he had delivered 40l. to J. N. for the use of the testator, and so there remained 60l. in his hands for which action accrued to the plaintiff as executor, and by award the defendant was compelled to answer without other contract or appointment, and without being put to action of debt. Br. Debt, pl. 186. cites 11 H. 6. 39.

13. It was held for law, that where two jointenants are of a manor, and the one of them assigns auditors to hear the account of the *bailiff* of the manor, who is found in arrear, the action of debt shall be brought in both their names, &c. Thel. Dig. 26. Lib. 2. C. 2. S. 17, cites Pasch. 18 E. 4. 3,

[L. 2]

[L. 2] For other Matters.]

[12. [1.]] If a corporation that has power by charter or prescription to make by-laws, makes a by-law and that if it be broke, to forfeit a certain sum to the corporation ; though it be not appointed by the by-law that it shall be recovered by action of debt, yet an action of debt lies for it, because this is a duty in the corporation, this being a by-law, and this sum forfeited to them. Co. 5. Clark 64. Hobert's Reports 279.]

5 Rep. 64.
a. Trin. 38
Eliz. C. B.
Clark v.
Gape, S. C.
See tit. By-
Laws, (A. 2)
pl. 1. S. C.
and the
notes there.

[13. [2.] Debt lies for an amercement in a court-baron. Hobert's Reports 279.]

Hob. 206.
in pl. 260.
Per Hobart,
Ch. J. S. P.

[14. [3.] If a talley be delivered to a customer, debt lies for it as soon as the money comes to his hand. 1 H. 7. Hobert's Reports 279.]

Hob. 206.
in pl. 260.
S. C. cited
by Hobart,
Ch. J.

Where the King is indebted to me, and assigns me to take it by the hands of a customer, and delivers me a talley of it, I by shewing of the talley to the customer, shall have action of debt upon it against the customer, if he has enough to pay. Br. Debt, pl. 17. cites 27 H. 6. 9. S. P. Br. Debt, pl. 120. cites 37 H. 6. 15. and if several have several tallies to be paid. &c. the collector is charged, first to him who shews him, and so to the second, and so to the third, as long as he has assets in his hands to pay, and the administrator of the creditor shall have action, by shewing [the talley] of the intestate against the collector. And 21 ibidem is, that he who shews talley ought to offer acquittance. Br. Tail de Exchequer, pl. 1. cites S. C.

[15. [4.] If there be a custom that if any breaks the pound of the manor, that he shall pay 3l. to the lord ; admitting this to be a good custom, an action of debt lies for it. 12 H. 7. 14. by all the Justices.]

S. P. by Hobart, Ch. J. Hob. 206, in pl. 260. cites S. C.—Br. Debt, 127.

cites 21 H. 7. 40.—Br. Prescription, pl. 40. cites S. C.—Br. Debt, pl. 239. cites 11 H. 7. 13.

5. Debt was brought for that the defendant had a leet, and his steward commanded the defendant, being bailiff, to make a pannel, who would not, by which the steward assessed a fine upon him of 40s. and the lord brought action of debt, and the defendant demurred ; quære, and see Debt of relief. Br. Debt, pl. 85. (bis) cites 7 H. 6. 12.

6. Debt was brought upon a custom, that if any break the pound of the lord in his manor of D. that he shall forfeit 3l. and that such a one broke it, &c. Unde actio accrevit, &c. And by the Justices ; if the custom was good as they thought it was not, because it cannot bind strangers, then the action shall lie well, quod nota. And yet he cannot prescribe in the action. Br. Dette, pl. 127. cites 21 H. 7. 40.

7. In debt brought for a fine imposed by a corporation against one elected bailly, for refusing to take the declaration imposed by the statute of corporations, whereby the election became void. After judgment for the plaintiff, it was assigned for error, that the statute (13 Car. 2.) did not enable the imposing any fine, but

only made the office void. But the Court held, that the refusal of the oath is, by a means, the refusal of the office, and consequently within their power given by the charter to fine for refusal to accept the office; and so judgment was affirmed. 3 Lev. 116. Pasch. 35 Car. 2. C. B. *Starr v. the Mayor &c. of Exeter.*

(M) *Upon what Judgment or other Record it lies.*

• Br. Debt, pl. 33. cites S. C. [1. A MAN may have an action of debt upon a *statute-merchant*, for it is in nature of an obligation, and the seal of the party is put thereto. * 43 E. 3. 2. b. † 3 E. 4. 27. 15 H. 7. 16.]
† Br. Debt, pl. 149. cites S. C. Du-bitatur.

[2. But no action of debt lies upon a *statute-staple*, for the seal of the party is not put thereto, and this is a duty made by a special law, which was not by the common law, and therefore he shall not have other remedy for it than the statute hath provided. 15 H. 7. 16.]

[3. But quære whether an action of debt lies upon a *recognizance in nature of a statute-staple*, inasmuch as the seal of the consor is put thereto.]

Br. Debt, pl. 128. S. P. cites 36 H. 6. a.

[4. An action of debt lies upon a *recognizance taken in Chancery*. D. 22 El. 369. 52.]

[5. So an action of debt lies upon the *tenour of such recognizance*. D. 12 El. 369. 52.]

[6. An action of debt lies upon a *recognizance taken before the Mayor of London*. D. 4, 5 El. 219. S. 9.]

Cro. E. 186 187. pl. 11. Trin. 3a Eliz. B. R. in case of *Chamberlain v. Thorp*. S. P. appears. —
Le. 130. pl. 178. S. C. & S. P. appears.

D. he was brought on a recognizance in Chaucey, and the declaration was, nat cognovit se debere, and the plaintiff had judgment.

* [350]

[7. If A. be bail for B. in Banco by recognizance acknowledged by him, and after judgment is given against B. for the damages and costs, and after a *scire facias* is sued upon the recognizance against A. and judgment is had thereupon against him, an action of debt lies upon this judgment against A. and if he hath judgment therein, he may take his body in execution thereupon, though he could not take his body in execution upon the judgment in the *scire facias*. Mich. 10 Car. B. R. between Rigault and Carrick, adjudged * upon a demurrer per Curiam, and the defendant taken in execution accordingly, and this afterwards affirmed in a writ of error.]

[8. If A. be bail for B. in a recognizance of 100l. in Banco, in an action against B. in which A. acknowledges himself to be bound in 100l. that if B. be condemned in the action, then he shall pay the money, or render his body to prison, or he will pay it for him; an action of debt lies upon this recognizance, alleging, that judgment was had in the said action against B. for 100l. and that B. did not pay

pay it, nor render his body to prison, and that A. had not paid it, for A. may aid himself by plea in this action, as well as he may upon the scire facias upon the recognizance. Hill. 14 Car. B. R. between Holmes and Faldoe. Intratur, Mich. 14 Car. Rot. 463. a writ of error was brought upon a judgment given in Banco, in an action of debt upon such recognizance; but the parties after agreed. But Master Hoddesden said such actions are usual.]

9. Debt for 40l. upon account and 20l. upon loan; the defendant pleaded that he granted to the plaintiff to levy it upon his land in D. and C. which he has levied; and per Belk. it is no plea; for the grant is void; for he cannot levy it, quod non negatur, by which he pleaded ut supra; and concluded, and so he owed him nothing, and a good plea now, per Thorp. Br. Dette, pl. 29. cites 41 E. 3. 7.

10. So to plead payment, and conclude nihil debet, and this upon contracts; contrary in debt upon specialty. Ibid.

11. If a man recovers land and damages in assise in ancient demesne, and the defendant has nothing in the franchise to render damages, as in London, &c. there the plaintiff may have debt in C. B. of the damages, and count upon the recovery, or may remove the record into Chancery and send it into Banco by mittimus, and shall have scire facias thereupon, and so to have execution in bank upon the record of another court, quod nota. Br. Executions, pl. 75. cites 39 H. 6. 3. 4.

Br. Debt, pl.
131. S. P.
and cites
S. C.

12. Debt was brought in bank upon recovery at E. in the Court of Piepowders, and the tenor of the record was sent into Chancery by certiorari and sent into Bank by mittimus, and the plaintiff declared upon it. Rolf tendered to demur for the not shewing of the record, and it was held peremptory. And by the opinion of the Court the plaintiff has well declared, by which he passed over, and pleaded nul tiel record, and so it was agreed that he may do notwithstanding the certificate of the tenor of the record. Br. Dette, pl. 85. (bis) cites 7 H. 6. 18.

13. If in a scire facias to have execution of an annuity the plaintiff has judgment, upon such judgment he shall have an action of debt. Per Wray Ch. J. 4 Le. 186. pl. 287. Mich. 17 & 18 Eliz. B. R. in case of Barnard v. Tuffer.

14. B. recovered in a scire facias upon a recognizance against T. and afterwards brought an action of debt upon the same recovery, and it was adjudged maintainable, notwithstanding that it was objected, that the judgment in such scire facias is not to recover debt but to have execution of the judgment. 4 Le. 186. pl. 287. Mich. 17 & 18 Eliz. B. R. Barnard v. Tuffer.

15. The plaintiff brought a scire facias upon a recognizance taken in the Chamber of London, and had judgment in the scire facias, and now he brought an action of debt upon that judgment; and upon a demurrer to the declaration, it was objected that it was ill, because the plaintiff did not shew that the Chamber of London was a court of record, but the Court said, they well knew that those of London have a court of record, and that they have used to take recognizances there; and Ld. Anderfon said, that admitting

4 Le. 182.
pl. 281. S. C.
in totidem
verbis.

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admitting the recognizance was not well taken, yet because in the scire facias upon it, the defendant did not then take advantage thereof, he shall be bound by his said admittance of it; and he said that it was in a manner agreed by the whole Court, that if upon this demurrer here, the judgment in London, upon the scire facias, be reversed; yet the Court here must proceed, and not take notice of the said reversal. Le, 284. pl. 384. Hill. 29 Eliz. C. B. Hollingshead v. King.

16. Debt upon a judgment in B. R. The defendant pleads a writ of error depending in the Exchequer, to which the plaintiff demurred, and per Curiam judgment pro plaintiff on Worley's case. 2 Keb. 659. pl. 13. Trin. 22 Car. 2. B. R. Holmes v. Chamberlain.

(N) For what Thing the Judgment being, Debt lies upon it.

[And in what Court. Pl. 9, 10.]

* Br. Debt, pl. 33. cites S. C. [1. IF a man recovers damages in a real action, as in a writ of assize, * coſinage, or entry ſur diſſeiſin, he may bring debt upon the judgment for the damages, for by the recovery they are in the perſonalty. ¶ 43 E. 3. 2.]
¶ Upon default in writ of coſinage, damages were found to 40l. upon a writ of inquiry of damages, and one was received, and damages were found againſt the tenant by receipt to 10l. and debt was brought of the 40l. Br. Debt, pl. 230. cites 39 E. 3. 8.

Br. Debt, pl. 33. cites S. C. [2. So he may have debt for the damages recovered in a writ of waſte. 43 E. 3. 2. adjudged.]

* Br. Debt, pl. 33. cites S. C. & S. P. [3. If a man recovers the arrears of a rent-ſervice, he ſhall not have debt for them upon the judgment, becauſe theſe continue a freehold. * 43 E. 3. 2. Contra, 9 E. 4. 50. b.]
For the thing is certain.

Br. Debt, pl. 33. cites S. C. S. P. [4. So a man ſhall not have debt for the arrears recovered in a writ of annuity. 43 E. 3. 2.]

Br. Debt, pl. 41. cites S. C. Per Finch. [5. Debt lies for damages recovered in a mortdancerſtor, as arrears of a rent. 46 E. 3. 25.]
clearly, though it was objected, that it was of the nature of the rent, which is frank-tenement.

In debt upon arrears of account, the defendant pleaded arbitrement, and held no plea; for the account before auditors is in a manner a record. Br. Debt, pl. 108. cites 4 H. 6. 17. [6. Debt lies for arrears recovered in a writ of account. 43 E. 3. 2. b. 11 H. 4. 79. b.]

[7. If a man recovers a debt, debt upon this judgment. 43 E. 3. 2. b.]

[8. If a man recovers debt or damages in London, in an action brought there by the cuſtom of the city, which lies not at common law

law in the courts of Westminster, yet when this is become a debt by the judgment, an action of debt lies in Banco or Banco Regis upon this judgment. Mich. 15 Car. B. R. in an action between Mason and Nichols, adjudged upon a demurrer to the declaration,]

[9. If a woman be endowed of *copyhold* land by the custom of the manor, and she recovers dower within the manor, and damages to 50*l.* for the profits of the land from the death of her husband, by the statute of Merton, cap. 1. the husband dying seised, yet she shall not have an action of debt at the common law for the damages, for upon such judgment no writ of error or false judgment lies; but the remedy is in the court of the (*) manor, or in Chancery. Co. 4. 30. b. between Shaw and Thompson resolved.]

Mo. 410.
pl. 559. S. C.,
held at first
by 3 Jus-
tices that
the action
did not lie,
* Fel. 601,
but Fenner,
e contra;

but at another day three of the Justices held the action maintainable, because the Court Baron cannot hold plea, nor award execution of so much damages, and yet the damages were well assessed there.—Cro. E. 426. pl. 23. S. C. but the only point there, was, whether she might recover damages to 50*l.* in the Court Baron, where they cannot hold plea for more than 40*l.* and the whole Court held, that she might, and that the damages were well awarded; but the other point does not appear there. Sed adjournatur.

[10. But if a man recovers damages in a writ of right-close, in nature of an assise, in a court of ancient demesne, he may have an action of debt for these damages at the common law. 8 E. 4. 6.]

11. Debt lies of execution of damages recovered in writ of waste or action real; for the damages are personal. Br. Execution, pl. 17. cites 43 E. 3. 2.

12. Where a man recovers in writ of annuity or assise, or has avowry for rent which is frank-tenement, and recovers the arrears without costs and damages, he shall not have action of debt of it, but *scire facias*; for it is real, but where he has judgment of it with costs and damages, which goes together, so that it be mixed with the personalty, there lies writ of debt; note the diversity per Cur. Br. Dette, pl. 212. cites 23 H. 8.

13. In an action of debt for 50*l.* The plaintiff declared *quod cum recuperasset coram Justiciariis de banco apud Westm' 50*l.* pro dam' against the defendant, prout per record & process' quæ dom' rex & regina coram eis causa erroris in eisdem corrigend. venire fac. & quæ in Cur. dicti domini regis & dom' reginæ in pleno robore & vigore remanent minime revocat' plen' apparet per quod actio accrevit, &c.* To this the defendant demurred, supposing that the judgment was suspended so far that an action of debt could not be brought upon it, pending the writ of error. But the Court held, if the defendant could insist upon this, he ought not to have demurred; but to have pleaded specially, and demanded judgment; if the plaintiff should be answered pending the writ of error; so judgment was given for the plaintiff. So if he had pleaded in bar of abatement, that a writ of error had been pending, the plea had not been good. 2 Vent. 261. Mich. 2 W. & M. in C. B. Biddulph v. Daffwood.

As to the
plea of writ
of error
pending,
see more at
tit. Super-
fedness, (A)
to (F.)

(O) At what Time.

[1. **A**T common-law if a man had recovered a debt, he might have had an action of debt upon this judgment *after the year.* 43 E. 3. 2. b.]

Cro. E. 608. pl. 10. S. C. and all the Justices held, that he might waive the elegit, and the judgment in the scire facias, on the recognizance being in force, he might have new action of debt. So if one recovers in debt upon an obligation, yet that remaining in force, he may have a new action; for Popham said, the difference is where one recovers in trespass, or other action, wherein he recovers nothing certain, but damages only; if he has judgment in such an action, there, when that judgment is in force, he cannot have a new action; but where the thing which is demanded is certain, as debt, &c. it is otherwise. Wherefore it was adjudged for the plaintiff. — Mo. 545. pl. 784. S. C. held accordingly by Popham and Fenner, absentibus Gawdy and Clench.

* [2. If a man sues a *scire facias* upon a recognizance in Chancery, and has judgment thereupon, and an elegit is awarded thereupon, it seems he cannot have an action of debt upon the recognizance afterwards, inasmuch as he hath elected another course to have his debt. Contra, P. 40 El. B. R. between Cowper and Langworth, adjudged.]

[3. So after the recovery in the scire facias, though he does not sue any elegit, yet debt lies upon the recognizance, inasmuch as it is changed into a new judgment. Contra, P. 40 El. B. R. between Cowper and Langworth, per Curiam.]

Though it was not shewn that the writ was returned, yet it was served, and the moiety of the land extended was delivered to the plaintiff. D. 299. b. S. C. says, it seems to be a bar; because the plaintiff cannot vary in pursuit of the execution of that whereof he had made election of record, &c. and the reporter adds, ideo quære.

[4. If a man recovers damages in a writ of entry, and sues an elegit for them, although the elegit be not returned, yet he shall not have debt upon the judgment afterwards, because he hath made his election upon record. D. 13 El. 299. 34. The same law if the extent be returned upon the elegit, although the party disagrees thereto. * 50 E. 3. 5. b.]

* Br. Debt, pl. 49. cites S. C. but adds a quære.

Br. Debt, pl. 61. cites 11 H. 4. 19. S. P. See tit. Execution (Ua. 8).

[5. If a man recovers a debt, and after the parties refer themselves to an award, and by assent the plaintiff was dismissed of the Court, by this word (dimittitur) he shall never have an action of debt upon this judgment, because he was once intirely dismissed of the Court to have any execution there. 11 H. 4. 44. adjudged.]

[6. [So] if a man recovers debt, and hath the party in execution, and he escapes, he shall not have debt upon the judgment against him afterwards. Dubitatur, 11 H. 4. 45.]

[7. If a man by indenture acknowledges to J. S. that he hath so much of his money due to him in his hands, without limiting any day of payment, yet debt lies presently. 11 H. 6. 39.]

And the other has no remedy but action on the case, for it was his folly not to take better security. Br. Debt, pl. 99. cites a H. 6. 44. by Newton.

[8. If a man bargains with another to enfeof him of certain land for a certain sum, so that there is a full bargain between them, he may demand the money in a writ of debt presently. 20 H. 6. 34. b.]

9. If

[9. If a man *leases* lands for years, *reserving yearly 20l. at four quarters*, debt lies for one quarter before the other are past, because it favours of the realty, and is as several contracts. Co. Lit. 47. b.]

agreed. Trin. 13 Jac. B. R. in Scarlett's case; and that so it is of a statute.—3 arg. S. P.—5 Rep. 81. b. Per Cur. S. P.

S. P. Br. Debt, pl. 87. cites 7 H. 6. 26.—Roll. Rep. 221. pl. 25. S. P. Rep. 22. 2.

[10. [So] if a man leases lands for years, *reserving weekly during the term nine quarters of wheat*, an action of debt lies for any week's quarter before the other are incurred, for this is a rent. Tr. 3 Ja. B. R. between the Lord Denny and Parnel adjudged.]

See (A) pl. 1. and the notes there. And see tit. Election, (B) pl. 1. S. C.

[11. But upon a *bill obligatory* for the payment of *several sums at several days*, no action lies till the last day is past. Co. Lit. 47. b.]

*[354] 3 Rep. 22. a. S. P.—Co. Litt. 292. b. S. P.—10 Rep.

128. b. S. P.—Cro. J. 505. pl. 16. S. P.

[12. So upon a *contract* debt lies not till all the days of payment are past. Co. Lit. 47. b.]

S. P. per Coke Ch. J. Roll. Rep.

221. Trin. 13 Jac. and agreed in Scarlett's case.—3 Rep. 22. a. S. P.—As if a sum is to be given in marriage payable at several days, debt lies not till all the days are past, though case lies for non-payment at the first day. 4 Rep. 94. b. Per Cur. in Slade's case.—5 Rep. 21. b. S. P.—Co. Litt. 292. b. S. P.—10 Rep. 128. b. S. P.—Cro. Car. 241. pl. 1. in case of Mills v. Mills. S. P. agreed per Cur.

13. If a man *leases for years* rendering rent, and the rent is *ar-rear* and the term expires, he cannot have distress, but shall have action of debt for the rent due before. Br. Dette, pl. 74. cites 14 H. 4. 30.

14. *Scire facias* upon recovery of debt and damages the defendant said that at another time the plaintiff sued *scire facias*, and the sheriff levied the money, judgment, &c. and it was said there that *fi. fa.* is not of record before the return thereof. Br. Executions, pl. 6. cites 20 H. 6. 24, 25, & 26.

So it was laid upon *capias ad satisfaciendum*, anno 37 H. 8. and not ad-

judged here. But in 21 H. 6. 5. it was reheard again, and there the plaintiff was compelled to answer to the plea of the defendant, and so he did, and therefore a good plea. So it seems upon a taking of the body by *capias ad satisfaciendum*, where no writ is returned. But it was said in anno 21 H. 6. 5. That in anno 19 E. 3. it was adjudged no plea. Quære. Br. Executions, pl. 6.

Note, that the case of *scire facias*, which commenced anno 20 H. 6. was here adjudged a good plea; that the sheriff had levied by *fieri facias*, and the plaintiff awarded to answer to it, by which he said, that the sheriff had not made thereof levy, Priest and the others e contra. But it was said, that M. 19 E. 3. it was awarded no plea, because the Roll. did not make mention thereof, nor did he show acquittance nor tally of the sheriff, by which execution was awarded. Br. Executions, pl. 52. cites 21 H. 6. 5.

15. If a man *sells* to another twenty acres of land for 10l. the vendor shall have action of debt though he did not *inseoff* the other, and the other has no remedy, but action upon his case; for it is his folly that he had not taken better surety. Br. Dette, pl. 99. cites 22 H. 6. 44. Per Newton.

16. And by him in debt of 20l. for twenty acres of land sold, it is a good plea that the bargain was to pay at the livery of seisin such



such a day, and that before the day the vendor prayed the vendor to infeof him, and upon this we paid the 20l. and he refused, judgment si actio. Br. Ibid.

17. If a man recovers damages in trespass in C. B. and the record is removed for error into B. R. there by all the justices the plaintiff may bring of the damages in C. B. or in B. R. at his pleasure, and it lies notwithstanding the writ of error; for as yet the first record is not reversed in fact by the writ of error; but it was held that he shall recite the record in his count, and that it is removed into B. R. by writ of error, but he shall not shew the record to the Court; but if the defendant pleads nul tiel record, the plaintiff shew it at his peril sub pede sigilli, quod nota. Br. Dette, pl. 166. cites 18 E. 4. 6.

[355] 18. Bill of debt was brought upon arrears of a lease before Michaelmas, and the rent was not due before Michaelmas, and it was challenged because it was brought before it was due. And per Tremaille, yet the bill is good; quære, for it seems that these words (*debet & injuste detinet*) were not true at the time of the teste of the bill; for he cannot detain it till the day of payment be come, nor upon a lease it is no debt before. But upon an obligation it is a debt before, but it seems that all is one; for though it may be released before, yet it is not detained till the day of payment be come. Br. Dette, pl. 126. cites 21 H. 7. 33.

19. L. Serjeant brought a *scire facias* upon a recognizance, and had judgment upon default, *quod habeat executionem*; and afterwards he brought an action of debt upon the said judgment, and exception was taken to the action; for that he ought to proceed upon the judgment given upon the *scire facias*, and ought to sue execution according to the said judgment by elegit, or *scire facias*, but not by *capias*; but the exception was not allowed; for the recognizance is a judgment in itself, and an action of debt will lie upon it, without any judgment in the *scire facias*; and debt lies as well upon the judgment as upon the recognizance itself; and so was the opinion of the whole Court. 2 Le. 14. pl. 24. 19 Eliz. C. B. Lovelesse's case.

20. Debt on bond was brought before the day of payment, and judgment was given for the plaintiff. Then defendant brought error, and pending the writ of error the day of payment happened. Now the action is become good which was not so before. 2 Le. 20. pl. 26. Trin. 29 Eliz. B. R. Thurstkettle v. Teys.

21. If a man be bound to pay 10l. such a day, and 10l. such a day. Here the obligee shall have his action for the first, because the duty was in itself several; per Periam. Owen, Hill. 30 Eliz. Hunt v. Torney.

For being payable at several days they become several debts in effect. 2 Inst. 393. — Cited Hardr. 27.

22. If a man be bound in a bond of 100l. to pay 20l. for so many years; he shall not have debt till the last year expired; per Periam. Owen, 42. Hill. 30 Eliz. Hunt's case.

23. A. made a bill of debt to B. for the payment of 20l. at four days,

days, scilicet, 5l. at every of the said four days, and in the end of the deed, covenanted and granted with B. his executors, and administrators, that if he make default in the payment of any of the said payments, that then he will pay the residue that then shall be unpaid; and afterwards A. fails in the first payment, and before the second day B. brought an action for the whole 20l. By the whole Court the action does well lie for the manner, for if one covenants to pay me 100l. at such a day, an action of debt lies; a fortiori, when the words of the deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract secundum subjectam materiam. Le. 208. pl. 290. Mich. 32 & 33 Eliz. C. B. Anon.

24. *Covenant to pay 5l. per annum for five years, and declares on a bill sealed; debt lies for non-payment of the 5l.* 3 Lev. 383. Mich. 5 W. & M. in C. B. March v. Freeman.

but quære of debt. Norris's case.

25. *A. by bill sealed covenanted to pay the plaintiff 5l. a year for five years at two payments, viz. 24 June and 25 December. The Court upon the first and second argument inclined that debt lay not till all the days are past. But it was insisted, that this is not like to bills of debt, but is a covenant to pay at several days, and covenant lies on breach at every day, as in case of a promise; and in this case the 5l. a year is for maintenance of a daughter, so that without payment she cannot be maintained in the mean time. And afterwards judgment was given for the plaintiff. Per tot. Cur.* 3 Lev. 383. Trin. 5 W. & M. in C. B. March v. Freeman.

Ibid. at the end of the case, the reporter cites Hardr. 178. NowELL'S CASE, that covenant lies at the first day, but quære of debt.

26. 8 Ann. cap. 14. S. 6. *Enacts, that it shall be lawful for any person, having rent due upon any lease for life, for years, or at will determined, to distress for such arrears after the determination of the leases.*

*[356]

27. *Covenant to pay 50l. at 5l. per ann. till the whole 50l. be paid, and in failure of payment of any 5l. then to pay the whole; action lies for the whole unpaid, at any time, after failure.* 8 Mod. 96. Trin. 7 Geo. Anon.

(O. 2) At what Time; before Performance of the Consideration.

1. *IF I. sells my land in D. for 100l. debt lies, and yet he has not the land, nor can he take it without livery.* Br. Contract, pl. 17. cites 37 H. 6. 18.

2. *And where a man is retained to be of counsel for 10l. per ann. he may have debt, and yet it may be that the other did not demand counsel of him, but there he shall say that he was ready if, &c.* Ibid.



Vol. 608.

(P.) *How it shall be brought; In what Cases in the Detinet; in Respect of the Persons.*

Lanc. 79.
S. C. ad-
judged ac-
cordingly.

—Lutw.

893. Trin.

2 Jac. 2. in

writ of er-
ror in the

Exchequer

Chamber.

Glover v.

Kendall, on

a judgment

in B. R.

where the

case was,

that K. brought a bill in debt for 602l. and 6s. against the Marshal of the Marshalsea, in the debt & detinet for an escape, and declared, that the plaintiff, as executor of E. B. had recovered against J. F. 600l. debt, and 21. 6s. for damages, and that J. F. was committed in execution, and the defendant suffered him to escape. The plaintiff had judgment by nihil dicit. But the judgment was reversed, because the action was brought in the debt & detinet, where it should have been in the detinet only, the recovery in the first action being as executor in the detinet only.

S. P. Whe-
ther the
money be-
came due in
testator's
life, or after
his death.

[2. If an executor brings debt upon an obligation made to the testator, where the day of payment incurred after the death of the testator, yet the writ shall be in the detinet only, for he brings the action as executor. 20 H. 6. 5. b.]

Br. Debt, pl. 1. cites 19 H. 8. 8.

[357]

[3. So if a man binds himself to the testator to pay him 100l. when such a thing shall happen; if it happens after the death of the testator, yet the writ of debt by the executor shall be in the detinet only. 20 H. 6. 6. b.]

4. When debt is brought by executors, and recovery had, and after the defendant escapes, and debt is brought upon this escape, this shall be in the detinet according to the first cause of action. Hut. 79. Hill. 1 Car. in case of Townley v. Steele.

5. M. brought an action of debt against H. a sheriff for an escape, and had a verdict against him. The defendant moved in arrest of judgment, that the action was brought by the plaintiff, as an administrator, for the escape, which was made in the life of the intestate only. The action ought to be brought in the detinet only, the plaintiff being but an administrator, who recovers not to his own use. Therefore stay judgment till the plaintiff move. Sty. 232. Mich. 1650. Martin v. Hendlye.

2d. Raym.
Rep. 698.
S. C. and it
was admit-
ted, that
after de-
murrer it

6. Debt by an executor for an escape of one in execution on a judgment of testator, and declared in the debt and detinet; and after verdict this moved in arrest of judgment; and it being doubted whether it was helped by the general words of (matters of the like nature) in the stat. of 16 and 17 Car. 2. to maintain it. At another

ther day were quoted 1 Sid. 379. 341. 2 Keb. 407. which is that it was helped after verdict; but Holt Ch. J. said, that *debet* *always is where the action is in the party's own right.* Et adjournatur, 12 Mod. 565. Mich. 13 W. 3. Holden v. Sutton. not aided after verdict by 16 & 17 Car. 2. cap. 8. because it would alter the nature of the action, and therefore the right was not tried, and judgment was stayed, nisi, &c.

would be ill; and the Court seemed of opinion, that it was

(Q.) In the *Detinet* only.
[In Respect of the Plaintiff Executor.]

[1. IF the *action* be of such a nature that he ought to name himself executor, it shall be in the *detinet* only, otherwise e contra. 20 H. 6. 5.]

5 Rep. 31. b. Mich. 41 & 42 Eliz. B. R. in Hargrave's

case. S. P. laid down as a general rule; because the thing or damages shall be affixed.

[2. If an executor recovers in *trespass* for goods taken out of his possession, in debt for the damages recovered, the writ shall be in the *debet* and *detinet*. 20 H. 6. 5. b. for he need not name himself executor.]

But if the goods were carried away in the life of the testator,

&c. and the executor brings an action and has judgment to recover sol. and damages for them, and upon this judgment brings debt, it shall be in the *detinet*; per Sniig B. Lane 80. Mich. 7 Jac. in the Exchequer.

[3. If a man possessed for years makes an *under-lease*, rendring rent, if his executor brings debt for rent incurred after his death, the writ shall be in the *detinet* only. 20 H. 6. 5. b.]

Clayt. 134. pl. 241. August 1639. before Thorpe

Judge of Assise; it was held, that it ought to be in the *detinet* only. Jennings v. Ingerloun.

[4. If the executor sues a *seire facias* out of a recognizance made to his testator, it shall be in the *detinet*. 20 H. 6. 5. b.]

[5. If an executor takes an obligation for a debt due to his testator by contract, in debt upon this obligation the writ shall be in the *debet* and *detinet*. 20 H. 6. 4. b. 5. b. Contra 25 E. 3. 40. adjudged.]

[358] S. P. accordingly; and so if the executor

6. But in debt by executors upon obligation made to themselves, by which it appeared that the bond was for the goods of the testator sold to the defendant, the writ was in the *detinet* only, and adjudged good. Dig. 113. Lib. 10. cap. 23. S. 5. cites Mich. 17 E. 3. 66. and Pasch. 25 E. 3. 40.

sells goods of the testator, it shall be *debet* & *detinet*, because the

commencement of the action was in the executor. F. N. B. 119. (M) in the new notes there, (a) ad finem, cites 20 H. 6. 415. b. [but it seems misprinted, and that it should be as in Roll.] But adds, that it was adjudged, that it shall be in the *detinet*, and cites 17 E. 3. Brief 87. [but it is 17 E. 3. 66. at Fitzh. Brief. pl. 287.]

new action against the one only; for the principal cause of the debt arose by the intestate, which cannot be changed by the act of the one executor or administrator, therefore it shall not be against him alone in the debet & detinet, but against all in the detinet only. Br. Debt, pl. 177. cites 11 H. 6. 7. 16.

It was agreed, that if a man recovers against executor, and [6. But if upon the fieri facias the sheriff returns a *devastavit* made by the executor, the plaintiff may have debt thereupon in the debet and detinet. (It seems there ought to be a judgment upon the return.) 11 H. 6. 16. b.]

upon the fieri facias, the sheriff returns *devastavit*, that upon this the plaintiff shall have debt against the executor if he will, or *special writ of execution, de bonis propriis*; but it is not agreed if the writ shall be debet & detinet upon this suggestion and return, or detinet only. But if the debt lies against him for this cause, then it seems, that it shall be in the debet & detinet. Br. Debt, pl. 184. cites 11 H. 6. 7.

See (Q) pl. 3. S. P. and the notes there. [7. If lessee for 20 years leases for 10 years, rendering rent, and dies, his executor or administrator shall have debt for the rent incurred after the death of the testator in the detinet only. Tr. 43 Cro. E. 840. El. B. R. between Sparke and Sparke, per Curiam.]

upon a lease made by intestate to commence after his death; resolved clearly, that it ought to be in the detinet only; for the title to the action is derived from the intestate, and by his contract only, and the administrator is to have it in the intestate's right, and when it is recovered it shall be assets in his hands; and in proof hereof were cited 19 H. 8. 8. 11 H. 6. 36. and 9 H. 6. 11. Noy. 38. S. C. stated short, but says that the action was well brought, and cites the two first cases cited above, and 20 H. 6. 4. The administrator shall sue in such case in the detinet only; but where executor in such case is sued, he in respect of the possession and the profits of the land taken by himself shall be charged de bonis propriis, [and the writ shall be in the debet & detinet.] Lev. 250, 251. Frevin v. Paynton.—a Keb. 407. pl. 26. Fruin v. Paynter. S. C. says the action was in the debet & detinet, but there being a verdict, it is aided by the statute of 16 Car. 2. cap. 8. and judgment for the plaintiff.—Sid. 379. pl. 10. Fruen v. Porter, S. C. states it, that the administrator was defendant.

[8. If the executor obliges himself to pay a debt due by contract by the testator, in debt upon this obligation the writ may be in the debet and detinet, because the obligation made it his own debt. 11 H. 6. 8. 17. b.]

S. P. Br. Debt, pl. 177. cites 11 H. 6. 7. [9. In an action of debt against the executor for rent incurred in the life of the testator, the writ shall be in the detinet only. 11 H. 6. 36.]

and 16. Per Babington and Newton.—Ibid. pl. 237. S. P. cites 10 H. 7. 5.

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In writ of debt against executors for rent arrears in their own time, where the lease was made to their testator, it shall be debet & detinet. Thel. Dig. 114. [10. In an action of debt against an executor for the arrearages of a rent, reserved upon a lease for years, and incurred after the death of the testator, the writ shall be in the debet and detinet, because the executor is charged of his own possession. 11 H. 6. 36. M. 41, 42 El. B. R. between † Hargrave and Boddy adjudged. But it was reversed for the same cause in a writ of error in Camera * Scaccarji. Co. 5. 31. same case. M. 9 Ja. R. Rot. 146. between Rone and Sir Henry Cary adjudged, that it lay in the debet and detinet, cited M. 41, 42 El. B. R. 7 Ja. B. R. between the Lord † Rich and Frank adjudged, cited M. 41, 42 El. B. R.]

Lib. 10. esp. 23. S. 19. cites Pasch. 11 H. 6. 44.

But otherwise it is for rent, due in the time of the testator. Thel. Dig. 114. Lib. 10. esp. 23. S. 19. cites 10 H. 7. 5.

In debt brought by executors against lessee for years, of the lease of the testator, of which parcel is due

due in the time of his testator, and parcel after his death, the writ shall be in the detinet only, per Englefield. Thel. Dig. 114. Lib. 10. cap. 23. S. 21. cites Pasch. 19 H. 8. 8.

† Cro. E. 711. pl. 35. *BODY v. HARGRAVE*, S. C. adjudged for the plaintiff. But adds a note, that afterwards this judgment was reversed in the Exchequer Chamber, for the point in law; for they all held, that it ought to be in the detinet only, because he is charged only by the contract of the intestate.—Mo. 566. pl. 771. S. C. against administrator, and adjudged good in the debt & detinet; and distinguished between action brought, by or against an executor or administrator.—Brownl. 56. S. C. and judgment reversed in Cam. Scacc.—Cro. J. 516. in a note added at the end of pl. 6. that in the argument of the case there of *REYNELL v. LANCASTER*, it was then delivered by the Court, that Hargrave's case 5 Rep. 31. was afterwards reversed in Cam. Scacc. in the point of debt & detinet, according to the book of 10 H. 7. 5.—Bullf. 23. S. C. cited by Williams J. to be so adjudged, but that the same was afterwards reversed upon another matter, and for other reasons.—2 Brownl. 706. S. C. cited by counsel arg. who said, that they were of counsel with Hargrave, when the judgment in B. R. was reversed in the Exchequer Chamber for this very point, and for this reason, because it was brought in the debt & detinet, whereas it should be in the detinet only.—S. C. cited Cro. C. 225, 226. pl. 3. and by three justices denied to be law; and Jones J. said, that he knew it to be reversed in point of judgment for this cause. But Mr. Danvers, in 2 Danv. 504. pl. 10. makes a quære if the book is not misprinted, otherwise the case is misapplied there, the action there being brought by an administrator, and not against one, for rent incurred in the time of the intestate.

† Cro. J. 238. pl. 1. S. C. adjudged well brought in the debt & detinet.—Bullf. 22. S. C. & S. P. agreed by all, and judgment for the plaintiff.—2 Brownl. 202. S. C. adjudged per tot. Cur. præter Yelverton.—S. C. cited Brownl. 56.—Palm. 116. S. C. cited.—Cro. J. 411. pl. 11. Mich. 14 Jac. B. R. *Ipswich Bailiffs, &c. v. Martin*. S. P. adjudged for the plaintiff.—3 Bullf. 211. S. C. adjudged.—Cro. J. 549. pl. 10. Mich. 17 Jac. B. R. *Mawle v. Cacyfyr*. S. P.—Palm. 116. *Moule v. Moodie*. S. C. and S. P. adjudged for the plaintiff.—2 Roll. Rep. 131. *Paul v. Moodie*. S. C.—All. 42, 43. Hill. 23 Car. B. R. *Roylston v. Cordrye*, the Court said, it was never doubted but that the action might be brought in the detinet only; but it had been much doubted if it might be brought in the debt & detinet.—Poph. 121. Pasch. 39 Eliz. Popham said, that in such case it shall be in the debt & detinet; for though they have the lands as executors, yet nothing thereof shall be employed to the execution of the will, but such profits as are above that which was to make the rent, and therefore so much of the profits as is to make or answer the rent, they shall have to their own use to answer the rent, and therefore they have quid pro quo, viz. so much of the profits for the rent, the action ought to be brought against them in such cases, but where they are to be charged in debt for rent, upon a lease made to the testator, and have not the profits of the lease itself, nor means nor default in them to come to it; the action of debt ought to be against them in the detinet only, and this is the case here, and therefore the action being in the debt & detinet, doth not lie.—Sty. 61. *KALE v. JOCELINE*. S. C. Bacon J. held it good in the debt & detinet. Roll J. said, it had been held pro & con to be good and bad; but that it must be in the debt & detinet, or else it will be mischievous to the plaintiff, and judgment for the plaintiff, nisi, &c.—S. C. cited All. 34. and other cases, and says, that the reasons of these contrary opinions, were the inconveniency of the one side and the other; for inasmuch as the executors cannot waive the term, it were hard if the rent should exceed the value of the land, and they have no assets, that they should be charged in the debt of their own proper goods, and yet, if the action must be brought in the detinet only, where fully administered were a good plea, then they may retain the land, and with the profits thereof satisfy debts upon speciality, whereby the lessor should be defeated of his rent; for the avoiding of which inconveniencies, it was resolved, that they may be charged in the debt & detinet, for prima facie, the land shall be intended to be of greater value than the rent is, if it be otherwise.

11. In debt against an heir; the writ shall be in the debt & detinet. Thel. Dig. 113. Lib. 10. cap. 23. S. 7. cites Pasch. 32:

E. 3. Brief 294. and Mich. 10 H. 7. 8. and the Register, fol. 140.

12. Writ of debt brought against executor upon his own contract with quod ei injuste detinet only, was abated; for it ought to be debt & detinet. Thel. Dig. 113. Lib. 10. cap. 23. S. 11. cites Mich. 41 E. 3. Brief 545.

13. Writ of debt against baron and feme, upon recovery had against the feme when she was sole, shall be in the debt and detinet. Thel. Dig. 113. Lib. 10. cap. S. 12. cites Mich. 47 E. 3. 23. & 9 E. 4. 25.

14. Debt against the heir upon the deed of his ancestor shall be [362] in the debt & detinet. Br. Dette, pl. 237. cites 18 H. 7. 8.

15. Debt against the executors of P. in the debt & detinet for

rent incurred upon a term after the death of the testator; they pleaded that part of the land was evicted in the life of the testator, and for the residue that they tendered, &c. et uncore prift, &c. Plaintiff demurred, but afterwards they agreed, and the plaintiff accepted according to the said apportionment without costs or damages of either side. Dy. 81. b. pl. 67. Hill. 6 & 7 E. 6. Barrington v. Potter.

3 Le. 306.
pl. 263.
Walcot v.
Powel. S.C.

16. If an action of debt is brought against baron and feme upon an obligation entered into by the feme before marriage it shall be in the debet & detinet, for by the marriage all the personal goods, and a power of disposing of the real, are by law given to the husband, which he has to his own use, and not as executor to the use of another; and resolved per tot. Cur. that this was matter of substance and the very point of the action. 5 Rep. 36. a. Trin. 30 Eliz. B. P. Lloyd v. Walcot.

S.P. because
the heir is
bound by
special
words in
the oblige-

17. So if an action is brought upon a bond against the heir of the obligor, it shall be in the debet & detinet, because he hath the assets in his own right, as the baron has the goods and chattles of the wife. 5 Rep. 36. a.
tion, per Gawdy. Cro. E. 712. in pl. 35. Mich. 41 & 42 Eliz. B. R.—It ought to be in the debet & detinet; but after verdict, it is cured by the Oxford act of jeofails. Lev. 224. Mich. 19 Car. B. R. Combers v. Watton.——Sid. 342. pl. 6. S. C. but doubted if it might be amended by stat. 16 & 17 Car. 2. cap. 8.—The writ against the heir is in the debet & detinet, which proves, that in law it is his own debt; per Dyer, and he said, that he could shew a precedent where such an action was maintainable against the executors of the heir. 2 Le. 11. pl. 16. Hill. 20 Eliz. C. B.

18. Debt in the detinet against administratrix of her husband for arrearages of a lease for years, viz. for a quarter's rent due in the life of the intestate, and two quarters in her own time. It was moved that the action ought to have been brought in the debet & detinet, according to Hargrave's case, 5 Rep. 31. but resolved, that the action was well brought in the detinet, she having the interest only as administratrix; and Hargrave's case was said to be no law, and that that judgment was reversed. Cro. C. 225. pl. 2. Mich. 7 Car. B. R. Smith v. Norfolk.

19. An action of debt was brought upon an obligation made to a bishop and his commissary for payment of debts and legacies; the action was brought by an executor, and judgment given by default against the defendant, the judgment was reversed by a writ of error, because the action was brought in the debet & detinet; whereas it ought to have been brought in the detinet only, because it was brought by an executor. Sty. 278. Trin. 1651. Lydale v. Lyfter.

(T) How it shall be brought in the Debet and Detinet.

Br. Debt,
pl. 44. cites
S.C. though
objected,
that as to the
baron it ought not to be in the debet, because it was not of his own contract, but of the feme's.

[1. IF debt be brought against baron and feme upon a recovery of damages against the feme dum sola fuit, it is good in the debet and detinet. 47 E. 3. 23. b.]

[2. If

2. If the *successor* prior brings debt upon an obligation made to his predecessor, the writ shall be in the debet and detinet. 47 E. 3. 23. b.] Br. Debt, pl. 44. cites S. C. — Ibid. pl. 45. cites S. C.

for where it is to his own use it shall be debet, as it seems, contra of executor, for this is to another's use.

3. Debt shall not be in the debet, but of money only. Br. Ley Gager, pl. 26. cites 50 E. 3. 16.

4. Debt was brought against administrators, the plaintiff recovered and brought another writ of debt upon the same record in the debet & detinet, where the defendants were convicted of this plea of plene administravit, and because in this case they are only charged as administrators, therefore they took nothing by their writ, quod nota. But see if they had been convicted upon such plea, where they should be charged de bonis propriis, as in 11 H. 6. 35. Br. Faux Latin, pl. 20. cites 11 H. 4. 59. [but it should be 56. a. pl. 2. and the other edit. is 56.]

5. Debt against baron and feme of the contract of the feme during coverture, the writ shall be debent & detinent; for the baron is debtor by the taking of the feme, and both ought to wage their law. Br. Faux Latin, pl. 52. cites 9 E. 4. 24. Br. Debt, pl. 110. cites S. C.

6. If a feme be indebted and takes baron, the writ of debt against the baron and feme shall be debent; for the baron is debtor by the espousals. Br. Dette, pl. 142. cites 7 H. 7. 1.

7. And if debt be due to a feme, who takes baron, and they bring debt, the writ shall be, quod debet to both, and shall count how the debt accrued to the feme dum sola fuit and that after they inter-married. Ibid.

8. If an annuity is granted to one for years, so long as the term continues, a writ of annuity lies for the same, but when the lease is determined an action of debt lies for the same; per Williams J. Bullt. 152. cites 9 H. 7. 16, 17. and says, that so is the old book of entries, Fol. 151. in debt for an annuity.

9. Debt against executors, upon arrears due in the time of the executors, upon a lease made to the testator, the writ shall be in the detinet and not in the debet. Br. Dette, pl. 237. cites 10 H. 7. 5.

10. So where a man recovers against executors and brings action thereof, this shall be in the detinet. And so of action of debt upon arrears of account brought by executors of account made to them. Br. Dette, pl. 237. cites 10 H. 7. 5.

11. Tanfield Ch. B. took this difference, where the action is grounded upon privity of contract it ought to be in the detinet as 11 H. 6. 37. 11 H. 4. 46. 10 H. 7. 5. But otherwise it is, when grounded on a tort, as 41 Ass. 15. Cro. J. 546. pl. 5. Mich. 17 Jac. in Cam. Scacc. in case of Reynell v. Lancaster.

12. Where the thing demanded is current coin, there the thing itself ought to be demanded and not the value, and the count ought to be in the debet & detinet: but where a foreign coin is demanded, there it ought to be in the detinet, and they may count to the value; but of the coin of the realm they ought to take notice what value it bears, Comb. 390. S. C. and held well enough in the debet & detinet. — Comb.

327. S. C. *bears*, and to that value it ought to be demanded; as in this case, and per Holt 100 nummi aurei, vocat' guineas, valoris vigint' unius solid. & 4d. Ch. J. as to foreign or medal coin, for to this value they were coined at the mint, which is their legal value, and therefore their proper denomination is 20s. pieces of gold, vocat' guineas. Per Holt Ch. J. Skinn. 573. pl. 16. Mich. 6 W. & M. in B. R. in case of Saint Leiger v. Pope.

plaintiff may elect whether to declare in the detinet, as for guineas in specie, or in the debet & detinet for the value in English money; but the Court agreed, that in that case there must be a default in payment of the foreign or medal coin in specie, before the party can bring debt in the debet & detinet for the value. — Where foreign coin itself is demanded, the action is in the detinet; * but if the value be demanded, it is in the debet & detinet; and the averment always is, that the defendant has neither rendered the foreign coin nor the value; per Holt Ch. J. 12 Mod. 81. S. C. — Lutw. 488. S. C. and S. P. to which Holt Ch. J. and Eyre J. seemed to agree.

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(U) How it shall be brought. In the Debet and Detinet; and where in the Detinet only. In Respect of the Thing.

The Chan- [1. IF the action be brought *for money*, it shall be in the debet
cery will and detinet, 50 E. 3. 16. b.]
never make
a writ in the debet but of money only, and therefore where debt was brought for certain *rent-corn*
and *rent-fowl*, reserved on a lease for years of lands, the writ, though in the detinet only was held
good. Per tot. Cur. Br. Debt, pl. 50. cites S. C.

As if a man [2. But if the action be brought *for dead chattels or living*, and
sells 20 not for money, it shall be in the detinet only. 50 E. 3. 16. b.
quarters of Contra, M. 41, 42 El. B. R. Barham's case.
wheat, or
a horse.
F. N. B. 119. (H) — In debt of things which are not money, as *corn, grain, &c.* the writ shall be in
the detinet only, and he shall recover the price or value of the thing, and not the thing itself; Quære.
Br. Debt, pl. 211. cites 9 E. 4. 10. 15. 41.

3. The writ was *quod reddat 10l. quas ei debet & injuste detinet & bona & catalla ad valenc' &c. quas ei injuste detinet*, and held good. Thel. Dig. 113. Lib. cap. 23. S. 9. cites Hill. 33. E. 3. Brief 913. And that so agrees the register fol. 139. and Nat. Brev. 152. where the writ is brought in *Banco*, but when it is *vi-contiel*, it shall be *quod reddat 10l. quas ei debet & catalla ad valenc' &c. quas eo injuste detinet*; for of debt in the county the writ shall say *quas ei debet* only.

But the ac- 4. Debt in the detinet; for that the defendant owed him 600
tion may be *gilders, monetæ Poloniæ*; and declares upon a bill obligatory, whereun
in the de- the defendant was bound to pay him 600 gilders of legal money
bet & de- Polonish, viz. *ad valorem 220l. legalis monetæ Angliæ*. It was said
tinet for the the action ought not to have been in detinet, because it is upon a
foreign mo- bill obligatory; the opinion of the Court was that forasmuch as he
ney, if it be is not to recover the gilders, but the value of them found by the jury,
made a cur- and the demand is not of any sum certain, and the value is not known
rent coin, as to the Court, that the demand is good enough in the detinet. It
by procla- was
mation.
Noy. 13.

was adjudged for the plaintiff. Cro. J. 617. pl. 2. Mich. 19 Pasch. 44
Jac. B. R. Rand v. Peck. Eliz. B. R.
in case of

Drapes v. Radhak.

5. If debt for 48s. in debt and detinet, and for two shirts in the detinet only; and he declared, that the defendant such a year retained the plaintiff to be his servant in husbandry, giving him 48s. and a shirt by the year; the Court said it was clear, that he may bring his action so by several precipes in one writ. Win. 75. Pasch. 22 Jac. C. B. Weaver v. Best.

6. Debt upon a bill, bearing date in the parish of St. Mary le Bow, London, which upon oyer appeared to be dated at Hamborough, and the plaintiff declared in the detinet only, for 6l. Hamborough money; it was objected against this declaration, that the action ought to be brought in debt and detinet; but adjudged it is well brought in the detinet, because it is not for a certain sum, but for 6l. Hamborough money which in English coin is 40s. value, and the value of the Hamborough money not being well known amongst us by common intendment, it ought therefore to be demanded in the detinet only; and judgment for the plaintiff. Lat. 4. Pasch. 1 Car. Ward's case. [365]

(X) What shall be a good Plea in Bar. [Of Debt on Judgments.]

[1. IN debt upon a recovery in another court, it is no good plea that the Court where &c. had taken him in execution, if he does not say that it was at the instance of the plaintiff. 7 H. 6. 19.]

[2. But if he says so, it is a good plea in bar. 7 H. 6. 19.]

[3. In debt upon a judgment, it is no plea that there is an error in the original process, or record of the first judgment, for he is put to his writ of error for that. 7 H. 6. 19.]

[4. In debt upon a judgment it is no plea in bar, that after the judgment the parties put themselves to an arbitrament by award of the Lord Chancellor, &c. and that the arbitrator had made such award, &c. and that he himself had brought an audita querela to be relieved upon this award, for this matter is not sufficient to maintain an audita querela, and if it was, yet he could not plead it, but is put to his audita querela. Tr. 7 Jac. B. Miles Fale's case adjudged.]

5. In debt the plaintiff counted upon a recovery of debt and damages in the Court of Record at Kingston upon Hull, and the defendant pleaded, that they were dismissed by the court of Hull in the same action, by assent of the plaintiff, because it appeared to the Court that the parties had put themselves in arbitrament, and therefore to say quod dimittitur judgment si actio, and it was awarded by the Court that the plaintiff shall take nothing by his writ, and so a bar. And per Hank. and Thirn. arbitrament made, or arbitrament pending and not finished, is a good bar in action personal; and per Hank.

Hank. so in action real; but bkrene contra. Br. Dette, pt. 61. cites 11 H. 4. 12.

* Br. Debt, pl. 63. S. P. cites 20 H. 6. 24. 25. [and there is no year of 26 in the Year Book.]

6. In debt of 10l. the plaintiff counted that he recovered against the defendant in a special assise 10l. in damages before such Justices; the defendant said, that within the year he sued fieri facias to the sheriff, by which he levied it, and paid to the plaintiff; judgment fi adio; and the payment over to the plaintiff was of little regard but only the levying by the sheriff. And Hill and Hank. held the plea no plea, and that the defendant shall render to the plaintiff, and shall have his remedy against the sheriff; but Thirn. was strongly contra, and that the debt is of record, and by the fieri facias is levied of record by an officer of authority, and if he pays it to the plaintiff, or sends it into Court or not, this is no default in the defendant, and that the levying was good, and the defendant cannot compel the sheriff to send them into Court, nor deliver them to the plaintiff, and therefore no default in him, and he is excused, which is the best opinion, and the reporter concordat. And after the parties agreed; and the writ willed quod denarios illos habeas hic in Cur. tali die, &c. Et si sit coram Justiciariis ass. tunc denarios illos habeas ad proximam session', &c. Br. Executions, pl. 35. cites 11 H. 4. 58. And says, see * 26 H. 6. 25. tit. and Lib. Intran. 170. that it is admitted for a good plea in scire facias, and issue taken thereupon, and the plaintiff may have account thereupon against the sheriff who levied it, and did not deliver them to the Court, nor to the plaintiff, as it seems there.

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7. If the plaintiff who has recovered the debt had brought writ of debt upon the first judgment, there the bringing writ of error upon the first judgment is no plea. Br. Executions, pl. 136. cites 10 H. 6. 6.

See tit. Condition (E. d) per totum.

(Y) What thing will *extinguish* a Debt. [Acceptance of] a higher Thing.

Dal. 53. pl. 28. Anno 8 Eliz.—

[1.] If a man accepts an obligation for a debt by contract, this extinguishes the contract. 13 H. 4. 1.]

S. P. agreed per Cur. and that in such case the obligor might with a safe conscience wage his law. But if one who was a stranger to the contract enters into bond afterwards to pay the debt at a day certain, and the debtor gives a counter-bond to the stranger, this does not determine the contract, and so the debtor by contract cannot wage his law. 2 Le. 110. pl. 142. Trin. 29 Eliz. C. B. Hooper's case.—But if a stranger to the contract, being present at the time of making, makes a promise to enter into a bond unto the party, &c. for payment of the money agreed for upon the contract, and afterwards becomes bound accordingly, the contract by this is determined, because the obligation is pursuant to the contract. Ibid. cites it as adjudged in one Pudsey's case.

* D. 21. b. pl. 132. Trin. 28 H. 8. cites S. C. and Ibid. 51. a. pl. 24. Mich. 23 H. 8. cites S. C. but takes no notice whether they were assigned on pais, or of record.—See (A. a) pl. 1.

[2. [30] if a man accepts an obligation for the arrearages of an account before auditors assigned in pais, this extinguishes the arrears; for the auditors are not of record; for of this the law lies, and for that the obligation is higher. Contra * 11 H. 4. 79. b. 13 H. 4. 1. adjudged.]

[3. If

[3. If an infant makes a contract for his diet and clothing, and after enters into an obligation with a penalty to pay it, and after the infant avoids this obligation, as he may for his infancy, yet it seems the contract shall not be revived. *Dubitatur*, P. 32 El. B. R.] S. P. as to contract by an infant for a coach and horses, and a bond afterwards entered into during his infancy, the contract is extinguished; and though afterwards at full age he assumed, yet in assumpsit brought he may plead, non assumpsit, and his infancy is sufficient evidence; and judgment for him nisi. 3 Keb. 798. pl. 55. Trin. 29 Car. 2. B. R. *Tapper v. Davenant*.

4. It is a good plea that the plaintiff took obligation of the parcel of the sum for the whole debt; for contract is intire. And the plaintiff said that the obligation was for a debt due by another contract, &c. and the others e contra. Br. Dette, pl. 57. cites 3 H. 4. 17.]

5. Debt upon arrearages of account before auditors, the defendant said that after the account the defendant had taken obligation of the same sum, and no plea by award; for it was a duty by record before, in which the defendant cannot wage his law. Br. Dette, pl. 64. cites 11 H. 4. 79.

6. One who hath a debt due to him by simple contract, takes an obligation for the same debt, or any part of it, the contract is determined. 6 Rep. 45. a, in Higgins's case, cites 3 H. 4. 17. b. 11 H. 4. 79. b. 9 E. 3. 50. b. 51. a.

7. So when a man hath a debt by obligation, and gets judgment upon it, the contract by specialty is changed into a matter of record. 6 Rep. 44. b. in Higgins's case.

(Z) [Extinguishment by] Acceptance of a Thing of [367] equal Altitude.

[1. **T**HE acceptance of an obligation for a debt due by another obligation is no bar of the first obligation. 11 H. 4. 79. b. 13 H. 4. 1.] S. P. But taking of an obligation of the same duty, is a determination of a contract of the same duty due before; for there he might have waged his law. Br. Debt, pl. 64. cites 11 H. 4. 79. — One chose en action cannot be discharged by another chose en action of the same nature, as one obligation is not discharged by acceptance of another obligation in lieu of it. 3 Lev. 237, 238. Mich. 1 Jac. 2. C. B. in case of Scarborough (Mayor, &c.) v. Butler. — See tit. Conditions (E. d) pl. 1. and the notes there.

2. Where an award creates a new duty, the old is extinguished thereby; but where it only ordains a release to discharge the old duty, it is otherwise. 1 Salk. 69. Hill. 8 W. 3. B. R. *Freeman v. Bernard*. Carth. 379. S. C. & S. P. — 12 Mod. 130. S. C. & S. P. — 3 Salk. 45. S. C. & S. P.

(A. a) [*Extinguished by*] Acceptance of a *lower Thing*.

See (Y) pl.
a. the dif-
ference be-
tween audi-
tors assign'd
en pais,
and as here of record.

[1. IF a man accepts an obligation for the arrears of an account before auditors assigned of record, this does not extinguish the arrears, because they are higher. 20 H. 6. 45. b. (It does not appear whether the auditors were of record.)]

Fol. 605.

[2. If the lessor accepts an obligation for rent due upon a lease for years, this does not extinguish the rent, because the rent is higher, being real, for of this the law does not lie. 11 H. 4. 79. b. 13 H. 4. 1. 20 H. 6. 45. b.]

Sec tit. Con-
ditions,
(S. c) and
(E. d) per
totum.

(B. a) In what Cases a *Collateral Thing* may be given in *Satisfaction without a Deed*.

Br. Debt,
pl. 70. cites
S. C. though
there was a
covenant in
the inden-
ture of
lease for the

[1. IF a rent be reversed by deed upon a lease for years, it is no good plea without a deed, that by the command of the lessor he retained the rent in satisfaction of the reparation of the house, which he had done, whereas the lessor ought to have done it. 14 H. 4. 27.]

lessor to repair; and the house was ruinous. Per Hill and Hank.

[2. The same law is if the rent was reserved without deed, for he hath acknowledged the duty by the pleading. 14 H. 4. 27.]

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[3. So if I lend money to you, if you pay the money to another by my command, yet this is not a good satisfaction without deed. 14 H. 4. 27.]

See tit. Mis-
casting (A)
and see tit.
Rent (H. c)

(B. a. 2) Declaration, &c. in Debt.

1. THE plaintiff in his count must shew deed in debt and annuity, and there the writ and specialty ought to agree; per Finch. Br. Monfrans, &c. pl. 15. cites 41 E. 3. 23.

2. In debt upon a contract, Hull said, you had thereof obligation after, Cul. said no, but of another contract, and the issue was, if the obligation was for this contract or not. Br. Issues joins, pl. 50. cites 3 H. 4. 18.

Br. Nofme,
pl. 65. cites
S. C.

3. Debt upon an obligation by J. F. the defendant said, that he made and delivered the obligation to another J. F. and not to the plaintiff, and a good plea, and the plaintiff was compelled to answer to it, quod nota; and so it seems that there were two J. F. and the wrong J. F. got the obligation and brought the action. Br. Obligation, pl. 82. cites 12 H. 6. 7. and Fitzh. Barr. 17.

4 If

4. If in debt upon a bond, A. counts that B. alone was bound, B. shall say that he and H. were jointly bound, judgment of the writ and a good plea, without any *sans ceo*, and the other may say that he was sole bound, &c. Br. Traverse per &c. pl. 82. cites 21 H. 6. 3.

5. Debt upon a bond of 40l. the defendant pleaded receipt by the plaintiff of 10l. parcel of the demand after the last continuance, judgment of the writ and a good plea without acquittance, or other specialty, where it is pleaded to the writ, contra where it is pleaded in bar, there it ought to be by specialty against specialty. Br. Brief, pl. 337. cites 5 E. 4. 138, and after fol. 140. by four Justices against three, it is no plea to the writ, without shewing specialty. Ibid.

6. Where a man is bound with condition in the obligation for the advantage of the obligee, he shall shew it in his count, and otherwise it is ill; contra, where it is to his disadvantage, or if it be indorsed, and is not in the obligation. Br. Obligation, pl. 58. cites 21 E. 4. 36. per Vavifor.

7. Debt upon a bond of 40l. to pay 20l. the defendant said, that the plaintiff had received part of the said lesser sum, pending the writ; and per Cur. the plea is good of this lesser sum of which the condition was made, *quære causam*, for the reporter contra, and that he ought to allege payment of the whole at his day, or to shew specialty of the receipt, because the action is upon specialty, but if he was paid, he ought to say, that it was paid after the last continuance, otherwise ill. Br. Brief, pl. 318. cites 5 H. 7. 41.

Br. Debt, pl. 208. cites S. C. Contra, that it is no plea without shewing acquittance, per Cur. and cites 3 H. 7. 3. and T. 15 H. 7. 104

8. Debt upon an obligation brought by J. P. the defendant said, that there were J. P. the father and J. P. the son, and he made the obligation to J. the father who is dead, and he who brought the action is J. P. the son, judgment si actio, and a good plea, and shall not be compelled to say quod non est factum, for this is false. Br. Obligation, pl. 95. cites 16 H. 7. 7.

9. Error of judgment in an action of debt on a bond for performance of covenants in an indenture, which was, that if the plaintiff paid the defendant 100l. at Michaelmas next, then the defendant would pay to the plaintiff 10l. yearly afterwards during his life; and the breach assigned was, that the defendant had not paid the 10l. yearly without mentioning the payment of the 100l. first by the plaintiff, and this was assigned for error; but adjudged that it is no error, and the first judgment affirmed; because the defendant in the first action by pleading conditions performed, had confessed the payment of the 100l. to him by the plaintiff; and the default of the payment thereof ought to have been shewn on the part of the defendant, and not on the part of the plaintiff. Mo. 365. pl. 497. Mich. 36 & 37 Eliz. B. R. Goodwin v. Isham.

10. In error of a judgment in debt in C. B. upon an obligation, it was assigned, because the count was *per scriptum suum obligationum concessit se teneri, &c.* without saying *sigillo suo sigillat* as the course is in B. R. though otherwise in C. B. But Gawdy said,

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said, the declaration was well enough though not according to precedents; for by saying *per scriptum suum obligatorium*, all the necessary circumstances are intended to concur, viz. the sealing and delivery of the deed; because it is not otherwise a writing obligatory, and *delivery is never alleged*, which proves that it is not necessary to allege the sealing, for the one is as necessary as the other. And accordingly the judgment was affirmed. Cro. E. 737. Hill. 42 Eliz. B. R. *Penlon v. Hodges*.

11. Plaintiff declared in debt for that the defendant retained him such a year, day, and place to embroider a jatten gown for a maid servant of her daughter's, and to take for the same 40s. it was alleged that debt lies not in this case because there is not any place alleged, where he should embroider it; nor that it was done before the action brought, and it was traversable, that he did not embroider it, and then there is not place for the venue, wherefore the declaration is not good. Sed non allocatur. For he cannot traverse but ought to have pleaded, non debet, and he need not allege the place where he did it, for it may be done in diverse places; and it shall be intended to be done where the retainment was, and it is not requisite that the time of embroidering thereof ought to be precisely alleged; for it shall be intended to be before the action brought; otherwise he could not have had his action; and the prothonotaries of C. B. certified, that it was not their course to allege the day or place of the performance of a contract. Wherefore the Court held it to be well enough, especially as the case is here, where the party defendant did not take issue thereupon; but let pass the advantage thereof, and is condemned by a nihil dicit, as here she was. Cro. E. 880. pl. 11. Pasch. 44 Eliz. B. R. *Lady Shandois v. Simpson*.

12. Where a man was indebted to another in 20l. he came to the party and desired him to forbear this for a certain time and that he would pay the same to him at a day certain by him prefixed, there if he sues him for this 20l. after the day, he needs not shew how this grew due, for the taking of a day certain to pay the same, this proves the verity and certainty of the duty; but if a man be indebted to another upon a simple contract, and sues for it upon a promise to pay it, be it upon such a promise, or the like, the plaintiff ought to shew the cause of this, in his declaration, to specify how, and in what manner the same grew due; for in the latter it was due presently, but a day given for payment, but in the other case, not so; therefore he ought there to shew the special cause how the same grew due; and so is the difference, which was agreed to be so by Yelverton and by the Court, quod nota, Bull. 153. Trin. 9 Jac. *Dean v. Newby*.

9 Bull. 244.
Meletine v.
Hall. S. C.
adjudged
for the
plaintiff.

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13. Debt, &c. in which the plaintiff declared upon two bonds, one to pay 100l. and the other 110l. and the action was brought generally for 200l. on these bonds, and satisfaction was acknowledged for the 10l. * After a verdict and judgment for the plaintiff, error was brought, the error assigned was, that it did not appear on which of the bonds the plaintiff did acknowledge satisfaction of this 10l. but the judgment was affirmed; because the plaintiff might lawfully

lawfully put both bonds in suit, and therefore he might acknowledge satisfaction of part generally, without shewing of which it is. Roll. Rep. 423. pl. 13. Mich. 14 Jac. B. R. Hall v. Malyn.

14. If a bond be made to one, and he doth not say in the bond that it shall be paid to the obligee, in this case the plaintiff must shew that it is to be paid to him, though not expressed in the bond. Brownl. 72. Hill. 14 Jac. Anon.

15. W. brought an action of debt against M. and declared that the defendant bought timber of him for 10l. *solvend' modo & forma sequenti*, viz. 5l. *ad festum Pasch. proxime sequentem*, and says nothing when the other 5l. should be paid, and the plaintiff recovered the whole 10l. by verdict, and now it was spoken in arrest of judgment for the cause aforesaid, but yet by all the Court it was good enough; for the law intends the other part of the money to be due presently, if no certain day of payment be alleged. Goldb. 116. pl. 11. Willoughby v. Milward.

16. If one brings debt for part of a debt due upon a contract, or obligation, and does not acknowledge satisfaction of the residue, the action is not well commenced; Arg. and judgment accordingly, by which a judgment in C. B. was reversed. Cro. C. 436. pl. 6. Hill. 11 Car. B. R. in case of Clothworthy v. Clothworthy.

Hell. 137.
S. C. but
S. P. does
not appear.
—Litt. Rep.
245. S. C.
but S. P.
does not
appear.

17. The plaintiff obtained a judgment in an hundred court for 58s. 4d. and brought an action of debt upon that judgment in this court for 58s. only, and did not shew that the 4d. was discharged, and upon noli tuel record pleaded, and a demurrer to that plea, the declaration was held to be naught for that very reason; for if a debt upon a specialty be demanded, the declaration must be for the whole sum; if for less you must shew how the other was satisfied. 3 Mod. 41. Pasch. 36 Car. 2. B. R. Marsh v. Cutler.

18. Debt on covenant to pay so much quarterly for four quarterly payments arrear, without saying when due and ending is naught, and so a judgment in B. R. was reversed. Show. 8. Mich. 4 Jac. 2. in Cam. Scacc. Piltarfe v. Darby.

19. Error upon a judgment in C. B. where the action was debt upon a bond of 1090l. penalty, conditioned that if such an one, being an apprentice, should purloin, or embezzle any thing to his master's damage, that then he should make it good. Breach assigned was, that he did embezzle and purloin 200l. Upon this issue was joined, and verdict for the plaintiff and judgment accordingly. Now upon error brought it was insisted, that this breach was not well assigned; for the condition of the bond, tying it up to such purloining as should be to the damage of the master, the plaintiff in the original action should have averred, that this was a purloining to the damage of the master. But the whole Court thought the judgment of C. B. was well given. For the words purloining and embezzling are always taken in a bad sense, et ex vi termini import damage to the master; and what appears plainly need not be averred, according to that maxim of law, quod constat clare non

non debet verificari. Judgment nisi. 10 Mod. 149, 150. Hill,
11 Ann. B. R. Thornicraft v. Barns.

In what case
eviction
shall be a
good dis-
charge of
rent. See
tit. Rent. (O)

* (C. 2) What shall be a good Bar in Debt.
Eviction. [Disseisin, &c.]

So if a man
sells goods
for money,
to be paid
at several

[1. IF a man *sells land* to another for a certain sum of money, in an action of debt for the money, it is no plea in bar that the land is evicted. H. 37 El. B. per Curiam.]
days, in this case, though the goods are re-taken by one that has a right to them, before the day, yet the vendor shall have action of debt, in respect of the contract. 3 Rep. 22. 2. Arg.

[2. [But] if a man possessed of a *ward* sells it to another for a certain sum, in debt for the sum, it is a good bar that the ward is *evicted by a stranger*. H. 37 El. B. per Curiam.]

[3. If *lessee for years, rendering rent, causes a stranger to enter upon him, and oust him*, by which the stranger deverts the reversion by disseisin, yet the lessor may have an action of *debt* for the rent arrear after, for this *lies upon the contract*, notwithstanding the disseisin. M. 3. Ja. B. R. between Carpenter and Collins, cited to be adjudged in B.]

Cro. E. 169.
pl. 6. S. C.
adjudged
according-
ly.—a Le.
99. pl. 121.
S. C. ad-
judged
according-

[4. If a man *leases for years to commence at Mich. rendering rent, and the lessee enters before Mich.* by which he is a disseisor, *and so continues after Mich. and the rent incurs*, the lessor may have debt for this rent; and this *disseisin shall not be any impediment by reason of the privity of contract* which is between them. M. 32 El. B. R. between Alexander and Dier adjudged.]
ly.—See D. 89. 2. Marg. pl. 111. S. C. and other cases cited, as to the lessee's entry before the day.—S. C. cited Litt. Rep. 17. by the name of Alexander v. Sexie, adjudged for the plaintiff; but says, that if the lessee had claimed fee, it would be otherwise, and Ibid. cites a Jac. C. B. BARTON'S CASE, where the lessee entered before the day, and made feoffment after the day, yet debt lies for the rent.

D. 4. b. pl.
1. &c.

[5. [So] if *lessee for years, rendering rent, makes a feoffment in fee*, yet this shall not be any bar of the rent arrear after, for the privity of contract continues, notwithstanding the feoffment, and the estate is not determined but at the election of the lessor.]

Exchequer.
RUSHDEN'S

CASE. S. P. argued.—Ibid. Marg. pl. 1. it is noted, that it was ruled for law in C. B. that if lessee for years, yielding a competent rent, makes feoffment in fee, that yet the privity of contract is not so gone, but that the lessor may have debt against his lessee; for otherwise three or four years rent may be arrear, and the lessor without remedy by a private feoffment, which is not reasonable.—Ibid. Marg. pl. 5. says, it is in experience held at this day, that if the lessee makes feoffment, the lessor shall have debt against him; or otherwise the lessee by his own act may determine the lease, and compel the lessor to enter for a forfeiture, which is inconvenient,

D. 4. b. pl.
3. Trin.
24 H. 8.
S. P. cited
as adjudg'd,

[6. If *lessee for years, rendering rent, never enters into the land*, yet if the *lessor waives the possession*, an action of *debt* for the rent *lies upon the contract*. D. 24 H. 8. 4, 3. 28 H. 8. 14.]

18 H. 6.

—Ibid. 14. 2. pl. 70. Trin. 28 H. 8. Goodale's case. S. P. But by Fitzherbert, it is otherwise of a lease at will.—And in debt against lessee for years, for the arrears of rent reserved upon it, he need not declare that the lessee had entered; for the contract is the ground

ground of the action. 4 Le. 18. pl. 61. Per Dyer cites 44 Eliz. 3. 5.—The occupation is not material, where the lease is for years or life; but otherwise of a lease at will. Hestl. 54. Mich. 3 Car. C. B. Jeakil v. Linne.—Vent. 41. Mich. 21 Car. 2. B. R. Anon. S. P. that in case of a lease at will, there must be an averment that the lessee occupied the lands.—Ibid. 108. Hill. 22 & 23 Car. 2. S. P. in Calthorpe's case.

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7. A man brought debt, and shewed an obligation in which A. was bound to him for tithes, bought of the plaintiff, in 10l. and it was adjudged a good answer, that another had recovered the tithes by an elder right, so that he cannot have the tithes, and therefore it was adjudged that he shall not have the debt. Br. Contract, pl. 12. cites 21 E. 3. 11.

Br. Debt,
pl. 84. cites
21 E. 3. 11.
S. P.

8. If a man who has estate conditional, or defeasible, makes a lease for years, rendering rent, and a man enters by former title, or for condition broken, this is a good bar for the lessee to plead. Br. Debt, pl. 225. cites 45 E. 3. 8.

9. Where a man leases land for years, rendering rent, and is bound by obligation to pay the rent, there in debt upon obligation it is a good plea that a stranger entered by title, which matter shall discharge the obligation, quod nota. Br. Dette, pl. 178. cites 20 H. 6. 23.

Br. Debt,
pl. 176.
cites S. C.

10. Debt upon an obligation, the condition was for performance of covenants contained in certain indentures, the defendant said that the place of St. A. with oblations, was leased to him by the same indentures for term of years, rendering certain rent, and that within the term, and before this day of payment, the pope had annulled the privilege, and the pardon of St. A. so that he is ousted of the profits by force of the lease. Frowicke Ch. J. said; the plea would have been the better, if he had said, that the pope, by writing proclaimed and published at such a place, had resumed the pardon; for otherwise it cannot be tried in England, &c. Brooke says quere; for it is admitted a good plea, if it may be tried. Br. Br. Dette, pl. 123. cites 21 H. 7. 6.

Br. Obliga-
tions, pl. 39.
cites S. C.

11. So it seems clear of a thing leased, and after is revoked by act of parliament, as wears in rivers, &c. Br. Dette, pl. 123. cites 21 H. 7. 6.

12. Eviction or expulsion may be given in evidence on nil debet; held per Cur. But the reporter adds a nota, that this point was formerly controverted. Sid. 151. pl. 18. Trin. 15 Car. 2. B. R. in case of Drake v. Beere.

(D. a) Pleadings. Nil Debet, or Nil Detinet, &c.

1. UPON a lease for twenty years expired if he counts for eight years, he need not to confess himself satisfied of the rest, but in debt upon an obligation of 10l. and he counts of 5l. he ought to confess payment of the rest, for it is one entire debt; but upon a lease, every term is a distinct debt, and in the case of the lease, entry into any parcel of the land leased is a good plea for all; for the rent cannot be apportioned. Br. Dette, pl. 87. cites 7 H. 6. 26.

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2. In

2. In debt upon *abatement* the defendant said, that no such submission, and the best opinion was, that because in this case the defendant may wage his law, and where he may wage his law he shall not traverse the contract, nor the cause of the debt, as to say that he did not buy of the plaintiff, nor borrow of him, &c. But in debt upon a lease for years of land, or upon arrears of account before auditors he may say non demisit, or no such account; for there he cannot wage his law, therefore he cannot wage his law, therefore the plea above ought to be nihil debet, and give the matter in evidence. Br. Dette, pl. 88. cites 8 H. 6. 5.

[373] 3. Debt by a servant against his master, who was retained for 20s. by the year and every year a robe or 5s. for the robe, and that the salary was arrear by so many years, and the robe by four years, and the action accrued to demand so much for the salary and 20s. for the robes; the defendant said, that he paid the robes at D. in the county of S. according to the retainer; and per Moyle, this is only nihil debet argumentive, but by others the plea is good; for if he pleads payment of the money this is no plea, but shall say nihil debet, but where he pleads delivery of another thing. Per Littleton, Choke, and Needham. J. Br. Dette, pl. 112. cites 9 E. 4. 36.

Br. Annuity, pl. 83. cites S. C.

4. Payment or nihil debet, is no plea in debt upon arrears of annuity, contrary to the specialty. Br. Dette, pl. 114. cites 9 E. 4. 48. 53.

5. In debt by executors for the arrears of an annuity, the defendant pleaded nil debet (supposing that by the death of the grantee the deed has lost its force, and that the action is founded upon the debt only, and not upon the deed.) But per Frowike this action is founded merely on the deed; for without the deed the action fails, so though the nature of the action is changed, and the annuity determined, this does not prove but that the action is founded on the deed; quod tota Curia concessit. Keilw. 47. b. pl. 4. Mich. 18 H. 7. Anon.

Br. Debt, pl. 124. cites S. C.

6. In debt for taking of a savage contra formam statuti, the defendant may plead nihil debet per patriam, per Tremain & Fineux, notwithstanding that it be founded on a statute; for it is not only upon the statute, but upon the statute and upon matter in fact. Br. Issues join, pl. 23. cites 21 H. 7. 14.

7. But in debt upon escape against Warden of the Fleet, or upon recovery of damages, it is no plea as it is said; quære, for they were in doubt of the issue, et Rede e contra, and that it is no plea. Ibid.

8. In debt upon a pain given by statute, nil debet per patriam, is a good plea; but doubted in debt against a gaoler. Heath's Max. 82. cites 3 & 4 Mariz. D. 145. & 50 Ed. 3.

9. An action of debt was brought upon the statute of purveyors, because he had cut down trees against the form of the statute 5 Eliz. The defendant pleaded not guilty; and it was moved that this was an evil issue; for he ought to have pleaded nil debet; and the Court commanded him to plead nil debet. Goldsb. 39. pl. 16. Mich. 29 Eliz. Anon.

10. In debt upon the statute of 32 H. 8. cap. *for the arrears of an annuity devised to M. the plaintiff's wife for life (but she died before the action brought) against the administrator of the terre-tenant.* The defendant *pleaded nil detinet.* Per Hale Ch. B. a will is not a deed, though it is as effectual to pass a thing as a deed is, yet it is not a deed in its own nature; because there needs no sealing nor delivery to a will, which is essential to a deed; and therefore *nil detinet* is a good plea to an action of debt grounded on a will, as well as to an action of debt grounded on a tally. And the action here is not so much grounded on the will itself, as upon a statute law, which enables men to dispose of their lands, and rents out of their lands, by will. Hardr. 332. Mich. 15 Car. 2. in the Exchequer. Wilton's case.

11. *Nil detinet* is no good plea to a deed; as in case of debt on a bond, or otherwise upon specialty; but where an action of debt is grounded upon matter in pais only, as upon prescription, or upon a deed that is not requisite to maintain the action, as for rent reserved upon a lease by deed, there it is a good plea; Arg. and cites several books which go upon this difference. Hardr. 332. Mich. 15 Car. 2. in Wilton's case.

12. In debt upon a grant of a rent, *nil detinet* is a good plea, because the plaintiff has other remedy to levy it, viz. by distress; but to an action grounded upon a grant of a bare annuity, it is not a good plea; because the grantee in such case has no remedy by distress; and therefore in that case the defendant must avoid it by matter of as high a nature, as by acquittance under seal, or the like. Per Hale Ch. B. Hardr. 333. Mich. 15 Car. 2. in Wilton's case.

13. Upon *nil debet* pleaded, entry and suspension may be given in evidence. Arg. which the Court did not deny. Mod. 118. Pasch. 26 Car. 2. B. R. Brown v.

14. Debt on a bill sealed for payment of 500l. and interest. The count was for 500l. without taking any notice of the interest, and held good; for the direct obligation is to pay 500l. 2 Show. 32. pl. 23. Hill. 30 & 31 Car. 2. B. R. Hinton v. Wilmore.

15. A lease was made of tithes for three years, rendering rent at Michaelmas and Lady-Day; and an action was brought for rent arrear for two years; upon *nil debet* the plaintiff had a verdict, and it was now moved in arrest of judgment, that the declaration was too general, for the rent being reserved at two feasts, the plaintiff ought to have shewed at which of those feasts it was due. But the council for the plaintiff said, that it appears by the declaration that two years of the three were expired; so that there is but one to come, which makes it certain enough. Curia, this is helped by the verdict; but it had not been good upon a demurrer. 3 Mod. 70. Trin. 1 Jac. 2. B. R. Pye v. Brereton.

16. In debt against a sheriff, the plaintiff declared upon a judgment obtained against J. S. and had sued out a fieri facias, and delivered it to the defendant, who virtute thereof had levied the money. The defendant pleads *nihil debet* and adjudged a good

plea. And this difference was taken, that where the writ has not been *returned*, the plea is good because it is matter of fact, whether he has levied the money or not; *secus* where the writ is *returned fieri feci*. 12 Mod. 604. Mich. 13 W. 3. Cole v. Acorn.

a Salk. 659. pl. 5. S. C. the Court held this to be no variance; for payment to the plaintiff or his attorney, is the same thing; the teneur made it a debt to the plaintiff; and in consequence it may be paid to him; and a solvendum to any body else would be repugnant; but payment to the plaintiff's attorney or assignee, is the same thing.

17. Debt on a *bond solvend'* so much money to the plaintiff himself, his attorney, or assigns, and upon oyer of this bond it appeared to be *solvendum to his attorney or assigns*, without mention of himself; on demurrer, exception was taken to the variance between the bond on which the plaintiff had declared, and the bond set forth, upon the oyer; but to this it was answered, that the declaration need not be according to the letter of the bond, but according to the operation of the law upon it; as if A. gives a bond to B. *solvendum to C.* who is a stranger, a payment to C. is payment to B. and the count must be upon a bond *solvendum to B.* and per Cur. if A. gives *bond to B. if B. appoints one, payment to him is payment to B.* And if B. does not appoint one, then it shall be paid to B. himself. 6 Mod. 228. Mich. 3 Ann. B. R. Roberts v. Harnage.

18. Wherever *matter of fact is mingled with a speciality*, or with a *record*, nil debet is a good plea, as in debt before auditors, it is a good plea. Arg. 8 Mod. 107. Mich. 9 Geo. Warren v. Confett.

It is no good plea to an action on a policy of insurance, nor to an action on a bail bond, though there is something dehors to be done,

19. Nil debet is no good plea to an action of annuity, nor to an action of debt on bond brought by administrator, it is true, it is a good plea to an action of debt for rent on a lease for years, but the reason is because the demise is the foundation of the action, and the deed is only an evidence of the demise, and so it is a good plea to an action of debt on penal statutes, and to actions of debt upon awards or to * accounts before auditors, and the reason is, because these are not the deeds of the parties. Arg. 8 Mod. 107. Mich. 9 Geo. in case of Warren v. Confett.

to charge the insurers and bail. Ibid. 108.——It is not good to an action on a bond, because the debt is immediately due; admitted. Ibid. 323.

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Because this action being founded on the articles, and the particular facts being but auxiliary to the deed, the plea of nil debet was no good plea. Ibid. 382; Pasch. 1 Geo. 2. S. C.

20. Plaintiff brought debt and declared upon an indenture by which he covenanted to transfer, &c. and defendant covenanted that he would receive and pay for the transfer, &c. and bound himself in 2800l. penalty to perform the same, and for non-performance plaintiff brought his action, adjudged in C. B. and affirmed in error, that nil debet is no good plea. 8 Mod. 106. Mich. 9 Geo. Warren v. Confett.

21. It is a good plea, where the action is founded on collateral matter and not comprised in the deed. Agreed. As in actions of escape, and in all actions founded on acts of parliament. 8 Mod. 324. Arg. Mich. 11 Geo.

(E. 2)

(E. a) Pleadings in General.

1. **I**N debt upon a lease of tithes levied by distress is no plea, per Skrene; because it is not land, in which he may distrain by the tithes severed; for it is the thing leased. Contra Till. Br. Dette, pl. 234. cites 11 H. 4. 46.

2. In debt upon an obligation the defendant pleaded condition if any goods which the plaintiff delivered to J. Hillary are esloigned that then J. Hillary should pay and satisfy the value, and said that the goods were esloigned, and the plaintiff brought action in London against J. Hillary, and recovered 20l. damages, and had his body in execution; and no plea; for body in execution, is no payment nor satisfaction. Br. Dette, pl. 26. cites 33 H. 6. 47. Br. Condition, pl. 14. cites S. C.

3. Debt upon a lease of four acres for 3l. &c. The defendant said that he leased the four acres and a rectory, and a rent, and a view of frank-pledge for the 3l. Judgment of the count. And so see that he pleaded to the count; but the matter is argued if he ought to traverse or not. Br. Count, pl. 23. cites 35 H. 6. 38.

4. Debt upon an obligation the defendant pleaded, that the plaintiff had received part of him pending the writ, and the opinion of the justices was, that it is no plea without specialty, quod mirum; for plea to the writ may be without specialty; contra of plea in bar; but this was held to be in bar for the parcel. Br. Dette, pl. 153. cites 7 E. 4. 15.

5. In debt the plaintiff counted, that the defendant put his feme and son to the plaintiff to board, and the plaintiff leased to the defendant a chamber for the feme and son, rendering for the chamber and board for every week 6s. the defendant said, that non dimisit cameram, &c. and the best opinion was, that it is a good plea to all, without answering to the boarding; for contract is intire, and therefore destroy it in part, and it is destroyed in all. Br. Dette, pl. 108. cites 9 E. 4. 1.

6. In debt the defendant said, that he has infeoffed him in certain land in pledge, and if he will re-infeoff him, he is ready, and always has been, to pay him; and the best opinion was, that it is a good plea. But several were of opinion, that where the contract is single at the commencement, and after pledge is given for the debt, that it shall be no plea in debt that the plaintiff has pledged, &c. Contra, where pledge is delivered for the debt at the making of the contract; for in the other case, the one shall have debt, and the other detinue of the goods; contra where it is put in pledge at the making of the contract. Br. Dette, pl. 111. cites 9 E. 4. 25. Br. Pledge, pl. 10. cites S. C.

7. It is a good plea for the master, that the servant departed out of service the first year, and shall not be compelled to the general issue. Br. Dette, pl. 112. cites 9 E. 4. 36.

8. Debt upon arrears of account before auditors assigned, where a man pleads nihil debet, or payment in a foreign county, this is a

good plea, and yet the *action* is founded upon matter of record by authority of the stat. West. 2. 11. quod non negatur. Br. Dette, pl. 141. cites 5 H. 7. 33.

9. In debt upon an *insimul computaverunt*, the defendant pleads, that he did not account & hoc paratus, &c. per patriam; it was objected, that this was no plea; for in such cases where the party may wage his law, the contract is not traversable; but that he ought to say, that he owed him nothing, and is ready to aver by his law, or by the country; for this is the point of the writ, or otherwise the plea is not good; and after the defendant, by advice of the Court, waived his plea. Kelw. 39. a. pl. 4. Trin. 13 H. 7. Anon.

10. In debt the plaintiff counted of a horse sold, &c. It is no plea for the defendant to say, that he did not buy the same horse, because he may wage his law. Keilw. 39. a. pl. 4. Trin. 13. H. 7.

11. In debt upon arbitrement, the defendant may plead no such arbitrement; and yet he may wage his law in the same action; but the reason is, because this arbitrement lies in the notice of a third person, and so the lay-gents may have consuance of it, and for that reason the plea has been held good. Keilw. 39. in pl. 4. Trin. 13 H. 7. Anon.

Dal. 49. pl. 11. Anon. S. C. 12. In debt the plaintiff counted of a contract; the defendant pleaded that he made a contract for a less sum, absque hoc, that he made any contract for the sum comprised in the writ as the plaintiff has supposed. The Court held that he shall not have the plea, because he may wage his law. Mo. 49. pl. 148. Pasch. 5 Eliz. Anon.

Dal. 49. pl. 11. S. C. 13. So in debt the plaintiff counted of the buying of a horse, and the defendant pleaded, that the buying was of two for the same money. Ibid.

Dal. 49. pl. 11. S. C. 14. Or where the plaintiff supposed the contract to be between him and the defendant, and the defendant pleaded, that it was made between them and another. Ibid.

Dal. 49. pl. 11. S. C. but misprinted as to the word (Ox.) 15. So where the plaintiff supposed the buying of an ox, and the defendant said, that it was a horse; in these cases the defendant may wage his law, and ought not to traverse the contract. Ibid.

16. In debt on a bill for 5l. in which were these words, to be paid as I pay my other creditors. The declaration ought to be special, according to the bill. Cro. E. 256. pl. 30. Mich. 33 and 34 Eliz. B. R. Bright v. Metcalfe.

S. P. Contra. Arg. Cro. E. 778. pl. 11. — If in such case there 17. In debt, not guilty is not a good plea; but if issue is joined thereupon, and a verdict is given, it is now good, and helped by the statute of jeofails, because it is only mis-joining of the issue; per Cur. Noy. 56. Anon.

be a verdict for the plaintiff, it shall be aided by the statute, because being an ill plea, and a false one, the plaintiff ought to have his judgment, but if the verdict be for the defendant, yet the plaintiff shall have judgment, because the deed is not answered by the bar. Gilb. Hist. of C. 2. 124. cites S. C.

18. Debt on a *bond* conditioned to *save the plaintiff harmless* of and from an obligation, in which the plaintiff, at the request of the defendant stood bound with him for the payment of the 11l. on such a day in May, which was before the date of the obligation; the defendant *pleaded payment secundum formam & effectum conditionis*; plaintiff demurred and judgment was given for him; for the defendant *ought to have pleaded non damnificatus*. Gouldsb. 159. pl. 90. Hill. 43 Eliz. Allen v. Abraham.

19. A debt *due by promise* is not discharged by *account*. 3 Lev. 237. Mich. 1 Jac. 2. C. B. Mayor &c. of Scarborough v. Butler.

20. Debt was brought upon a *bond for performance of covenants*; defendant pleaded in bar, that for all the breaches till such a time, he *had brought covenant and recovered damages*, and that there were no breaches since that time; and demurrer, and judgment for plaintiff; for the very plea the bond is forfeited. Though Carthew objected, one might waive the benefit of a forfeiture of a bond, as well as the forfeiture of a copyhold estate, &c. and the bringing of covenant was a *waver* of the forfeiture of the bond and so a bar. But per Cur. even in equity it would be *no bar till satisfaction*; as if two be bound in a bond, judgment against one is no discharge to the other before satisfaction. 12 Mod. 321. Mich. 11 W. 3. Pierce v. Hutcheson.

21. Debt *upon a judgment*, defendant pleads in bar, that a *capias ad satisfaciendum* was taken out against him at such a time, by virtue whereof he *was taken in execution*; and that the said *capias* was *returned on record*, but did *not aver that the execution continued*, or that the debt was paid; and on demurrer, Holt Ch. J. said, if he was once in execution, it must be intended he continues so, if he has not paid the money; for if he has escaped, you should reply that of your side that are plaintiffs, for this is a plea in bar, and good to common intent. And he quoted two cases, where he had known *escape replied* to such a plea; and a taking in execution is a bar to all other remedies while it lasts, and we cannot intend an escape. 12 Mod. 541. Trin. 3 W. 3. Redmond v. Joseph.

22. *Solvit ante diem* is no plea in bar to *debt upon bond*, because no material issue can be joined upon it. 10 Mod. 147. Hill. 11 Ann. B. R. Merril v. Josselyn.

S. C. cited, and said, that in such cases there is no way

for the plaintiff to help himself but by demurrer. 10 Mod. 167. Mich. 1 Geo. 1. B. R. Arg. cites also the case of Atwood and Coleman. — Arg. cites S. C. 10 Mod. 304. Pasch. 1 Geo. 1. B. R. and cites also the case of Hill and Manby.

23. But there is no doubt that *accord with satisfaction before the day* may be pleaded in bar of debt upon bond, because being pleaded by way of excuse it supposes non-performance, and the *defendant must prove his plea*. Arg. 10 Mod. 304. Pasch. 1 Geo. B. R. and per Prat. J. 306. & vide 307. in case of Weddall and Manuporters of Jocar.

For more of Debt in General, see *Actions* and the several *Kinds of Actions*, &c. throughout this Work.

Decies Tantum.

See F. N. B.
171, and see
Hawk. Pl.
Cr. 160.
cap. 85. §.
10. to the
end.

(A) For what Act or Thing it lies. What shall be said a Taking.

Br. Decies Tantum, pl. 9. cites S. C. but says, the case is so ill reported, that it is not easy to understand it. — Fitzh. Decies Tantum, pl. 9. cites S. C. clearly, according to Roll.

[1. **A** MAN buys lands of one party and has the better bargain to maintain the suit, this is a taking, for which he shall be punished by this writ. Adjudged. 41 Ed. 3. 9. b.]

2. 34 Ed. 3. cap. 8. *If either of the parties to the suit will prosecute a juror that has taken a bribe on either side to give his verdict, he shall have his plaint by bill presented before the same Justices, and the juror shall answer without delay; and if any other shall prosecute such juror, the offence shall be heard and determined as aforesaid, and such prosecutor shall have half the fine; and the parties to the plaint shall recover their damages by assessment of the inquest, and the offender shall be imprisoned for a year, and be incapable of a pardon; and if the party will prosecute before other Justices, he shall have the suit as aforesaid.*

Decies Tantum was brought before Justices of nisi prius, of taking money in quare impedit, and the inquest found against them, by which the Justices awarded them to prison, and gave day over in Bank, and it was awarded, that the King, and party recover 10 times so much, &c. the one moiety to the King, the other to the party, and the jury awarded to prison, and the party was first satisfied, and after the King; for per Morris, the King has not this as a debt, but as a fine; and where the King has fine, the party shall be always first served, by which they satisfied the party, and found surety to satisfy the King, and were delivered out of prison. Quod nota. Br. Decies Tantum, pl. 6. cites 41 E. 3. 15. — Fish.

3. 38 E. 3. cap. 12. *If a juror takes any of either party to give his verdict, and be attainted thereof by process contained in the article of jurors of the 34 E. 3. cap. 8. be it at the suit of the party that will sue for himself, or for the King, or at the suit of any other, he shall pay ten times so much as he hath taken, to be divided betwixt the King and the prosecutor, and all embracers that procure such inquest, shall incur the like punishment.*

If the juror or embracer have not wherewith to make gree, he shall suffer a year's imprisonment.

But no Justice or other officer, shall inquire of this offence ex officio.

Decies Tantum against an embracer, for taking of money for embracery, and the count is ill because it is not alleged whether he embraced in fact, or did not embrace, per Cur. Quod nota; for the effect of the statute is, that a man shall not embrace; for if he takes money to embrace, and does not embrace, the action does not lie, per Cur. And per Prisot, the statute is against embracers, so that it ought to be the plural number; but jurors are jurors as soon as they are sworn, and therefore if they take money for saying their verdict, and after the plaintiff is nonsuited before verdict, yet the action lies; but otherwise it seems, if the juror be struck out before that he be sworn, for then he is no juror. And after issue was taken, whether the embracer did not take the money, and the others

Others e contra, quod nota, notwithstanding the opinion afore said. Br. Decies Tantum, pl. 14. cites 37 H. 6. 31.—Fitzh. Decies Tantum, pl. 2. cites S. C.

Certain jurors took money of the party after their verdict, given without covenant thereof made before, viz. Every one half a mark, and were thereof convicted by verdict, and were put to fine, viz. Every one half a mark. And so see that it is out of the case of the statute of Decies Tantum. But the statute wills, that they shall be imprisoned for a year, without making a fine, and this seems to be where they take contra formam statuti. Br. Decies Tantum, pl. 15. cites 39 Aff. 19.

4. Note, by the statute of * 27 E. 3. cap. 3. That where [379] jurors take money to give their verdict, the party may have bill against them immediately before the Justices of nisi prius, or other Justices; but per Thorp, they cannot award them to prison before judgment. Br. Bill. pl. 46. cites 41 E. 3. 15.

* So are all the editions of Brook. The Year Book does not mention

the statute. But it seems it should be the statute of 34 E. 3. cap. 8.

5. If a man impannelled and returned upon issue takes money of the one party for his verdict, and after is no juror upon the issue, yet decies tantum lies, by some Justices, but others e contra, and that action of maintenance lies, quod nota inde. Br. Maintenance, pl. 15. cites 21 H. 6. 54.

6. Upon issue of decies tantum in Middlesex, the jury may give their verdict generally quod receperunt denarios prout, &c. though the giving of the money was in another county; for the matter is not local, and this by conscience, and the attaint does not lie; for it is true quod ceperunt argentum, &c. but they cannot say that guilty in the county of Norfolk expressly, by Starky and some of the Justices, and several apprentices; but Brian J. contra; for then the defendants shall be doubly charged, if the plaintiff brings another decies tantum in another county, this recovery will not be a bar, which seems not to be law; for he may aver, that it was all of one and the same receipt, and the place nor county is not traversable where it is not of things local, as of trees cut, grafs trampled, or the like. Br. Attaint, pl. 120. cites 22 E. 4. 19.

7. So in issue upon assets enter mains. Ibid.

(B) Writ. Pleadings and Proceedings.

1. DECIES tantum against several, and supposed that J. N. and W. received where the receipt of the one is not the receipt of the other, judgment of the writ et non allocatur, by which they pleaded not guilty; nota not guilty after issue. Br. Decies Tantum, pl. 4. cites 40 E. 3. 33.

2. A writ of decies tantum was maintained against the jurors and embracers. Thel. Dig. 106. Lib. 10. cap. 15. S. 8. cites Pasch. 41 E. 3. 9.

3. Decies tantum by the baron and feme, and because the feme was named the writ was abated. Br. Decies Tantum, pl. 20. cites 43 E. 3. 16.

4. Decies tantum against jurors, whereof the one had taken 10s. and another 8s. 8d. and the third a coat of the price of 40d. Br. Decies, pl. 30. cites S. C.

to the damage of ten marks, and were thereof attained, and because the plaintiff had not severed his damages the Court was of opinion to have taken the inquest de novo, and the plaintiff released his damages, by which it was awarded, that the King recover the moiety of so much as they had taken, and the party the other moiety, et quod capiatur. And after the three came and tendered ten times as much, &c. Per Mowbray they ought to go into the receipt [of the Exchequer] and there to pay it, and they shall send writ to them, and then they shall be delivered out of the Fleet, and after estreats were delivered into the Exchequer by the command of the Court. And the serjeants of the King or one of the Justices, shall go into the receipt of the King with the money adjudged to him, and there pay it, and have tally to the barons of the Exchequer, et sic vide. Br. Decies Tantum, pl. 8. cites 44 E. 3. 36.

[380] S. P. and so 5. In decies tantum, the sheriff returned nihil, the plaintiff see that a man may have as many pluries capias as he will. Br. Exigent, pl. 9. cites S. C. prayed capias in a foreign county and could not have it, contra in action upon the statute of labourers; for in the one case the law presumes that he is sufficient, and in the other not. Br. Process, pl. 128. cites 47 E. 3. 4.

Br. Exigent, pl. 9. cites S. C. 6. In decies tantum the process may be capias infinite, or distress infinite; but not capias in a foreign county. Br. Decies Tantum, pl. 9. cites 47 E. 3. 4.

Fitzh. Decies Tantum, pl. 7. cites 7 H. 4. 3. S. P. 7. Decies tantum is well brought by baron alone, though it be founded upon cui in vita brought by him and his feme; the reason seems to be that he is to recover only a chattel, and he counted of a receipt and did not say by whose hands, and yet good. Br. Decies Tantum, pl. 10. cites 7 H. 4. 2.

8. In decies tantum the writ was in loquela quæ fuit inter J. P. plaintiff and W. T. desforceant per breve nostrum de iudicio de uno messuagio, &c. And the defendant pleaded to the writ, because he did not shew by what writ of judgment. Per Alston it appears, but let that be saved to you, therefore answer quod nota. And the best opinion was, that the writ was good. Br. Decies Tantum, pl. 2. cites * 3 H. 6. 23. And such a writ of disceit was sued anno 120 H. 6. 10. upon casting of protection, and the writ awarded good notwithstanding such exception.

9. In decies tantum, not guilty is no plea, but that he did not take any thing for giving his verdict. Br. Action sur le Stat. pl. 14. cites 8 H. 6. 9. & 10.

10. If decies tantum varies from the record it is not good, as if the first record is J. D. of A. yeoman, and the decies tantum is J. D. only; by the best opinion. Br. Variance, pl. 6. cites 9 H. 6. 1.

Thel. Dig. 77. Lib. 9. cap. 1. S. 12. cites S. C.

Fitzh. Decies Tantum, pl. 6. cites S. C. 11. In decies tantum it is no plea that no verdict was given; for if they take money they offend against the statute, if they give verdict or not, and so if they take money and give true verdict; by

by which they said that they did not take any money for saying their verdict, Prift. Per Newton, you ought to plead this *severally* for every one of them, and so he did. Br. Decies Tantum, pl. 11. cites 21 H. 6. 20.

12. In decies tantum against J. N. of D. he said that he was *conversant and dwelling at S. the day of the writ purchased and at all times after*; and the best opinion was, that this is a good plea and is at common law, though it be in action in which process of outlawry does not lie, and shall serve at this day after the statute. Br. Decies Tantum, pl. 12. cites * 21 H. 6. 52.

13. And by some of the Justices, no such record by which he was sworn is no plea, for the *action lies though he was not sworn*. And some e contra, therefore see the statute, and that *where he takes money and is not sworn, action of maintenance lies*. Ibid.

14. Decies tantum *ad grave damnum, and in our contempt, and did not say ad grave damnum of the plaintiff, and yet the writ awarded good, for it is action popular, which every person may have who will,* and therefore it is not more (grievous) to the plaintiff than to another*. Br. Action Pop. pl. 2. cites 21 H. 6. 54.

and cites 21 H. 6. 5. but it should be 21

* The other editions of Br. are pl. 11. and cites 21 H. 6. 5. but it should be 21 H. 6. 54. b. Br. Replication, pl. 26. cites 21 H. 6. 54. S. C.

Br. Decies Tantum, pl. 12. cites 21 H. 6. 52.—The other editions of Br. are pl. 11. H. 6. 54. b. * [381]

15. Decies tantum against J. N. who said, *there is multiel record in he was sworn*, and by some Justices the action lies though he was not sworn, and some e contra, and that writ of maintenance lies, and the defendant demurred upon the plea. Br. Record, pl. 26. cites 21 H. 6. 54.

16. In decies tantum, the writ was *ad grave damnum, &c. without saying querentis*, and yet adjudged good. Thel. Dig. 96. Lib. 10. cap. 6. S. 40. cites 21 H. 6. 59.

17. Writ of decies tantum was *ad grave damnum & in nostri contemptum, &c. without saying ad cujus damnum*, and yet adjudged good. Thel. Dig. 115. Lib. 10. cap. 25. S. 4. cites Trin. 21 H. 6. 59.

18. Decies tantum against jurors for taking of money for giving his verdict, who said that he did not take any money for giving his verdict, Prift; and a good issue, and so note that it is not pregnant. Br. Negativa, &c. pl. 20. cites 22 H. 6. 20.

19. Decies tantum, and the writ was *in loquela; which was between J. P. plaintiff and W. D. deforçant, per breve nostrum de judicio de uno mesuagio, &c.* and did not shew what writ of judgment; and the opinion was that it is well. Br. Brief, pl. 35. cites 35 H. 6. 36.

20. In decies tantum by W. M. the defendant pleaded an ill bar, and the plaintiff replied, and would not demur; the King cannot demur, for he is not intitled but by the party, and to this the reporter agreed, for the king is not intitled before judgment, but he is intitled immediately by the judgment upon a cap. utlagry, and therefore by him the King there may demur. Br. Utlagry, pl. 33. cites 38 H. 6. 1.

21. If the party grieved releases to the jury who have taken money, this is not good, but a stranger may have decies tantum, and

and shall not be barred by the release. *But if the King had released, all should have been barred.* Br. Decies Tantum, pl. 16. cites 5 E. 4. 2.

Fitch. Decies Tantum, pl. 3. cites S. C.

22. Decies tantum for *embracing and taking of* 10l. for the embracery the defendant said, *that he is learned in the law, and at N. was retained to be of counsel* with the party, by which, &c. and took of him 6s. 8d. and gave evidence to the jury, and prayed them that if his evidence proved true to pass with his client, which is the same embracery, &c. and no plea, because he did not answer to the rest of the 10l. by which he said as above *absque hoc, that he took more than 6s. 8d. &c.* Br. Decies Tantum, pl. 17. cites 6 E. 4. 5.

Fitch. Decies Tantum, pl. 4. cites S. C.

23. Decies tantum was found for the plaintiff, who prayed judgment; Fairfax prayed for the King that they would not give judgment; for there is *another decies tantum pending of taking of greater sums, and this suit is by covin.* Pigot said, it may be that the parties agreed in the other suit, and this may be by covin, by which judgment was given that the plaintiff recover. Br. Decies Tantum, pl. 13. cites 9 E. 4. 4.

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(C) Punishment.

1. JURORS who are convicted in decies tantum, *shall be imprisoned* and so they were, *and satisfied the party, and found surety for the part of the King*, upon deliverance out of prison, quod nota. Br. Imprisonment, pl. 4. cites 41 E. 3. 15.

2. In writ upon the statute against juries, the *sheriff returned nihil at the grand distress*, and prayed exigent, and could not have it, and after he prayed that they shall be distrained by all the lands which they had the day of the inquest, and could not have it but only the day of this writ purchased. Quod nota. Br. Decies Tantum, pl. 7. cites 44 E. 3. 12.

For more of Decies Tantum in general, see other proper Titles.

Declaration.

(A) Want of Form. And what is Form; and what is Matter.

1. **P**LAIN^T in assise was challenged, because *wood was put before pasture*, & non allocatur. Br. Brief, pl. 27. cites 8 Aff. 24. Br. Brief, pl. 261. cites S. C.

2. *Quod ei desorceat by two, as heirs to the tail in gavelkind, the demandant alleged esplees in the donees, and also in themselves, which is surplusage, and yet because the statute of 34 E. 3. cap. ultime is that the count shall not abate for want of form, if it has matter sufficient, the count was awarded good, notwithstanding this surplusage.* Br. Count, pl. 31. cites 46 E. 3. 21.

3. *Formedon of the moiety of 30 acres of land, which B. together with another moiety of 30 acres of land, gave, &c. and because he did not say with another moiety of the aforesaid acres of land, therefore the writ was abated.* Br. Demand, pl. 6. cites 5 H. 5. 8.

4. *The form shall be observed in matters which are not traversable, as attachment on prohibition and esplees in formedon, &c. and yet they are not traversable.* Br. Count, pl. 11. cites 9 H. 6. 61.

5. Count or declaration must be *formal*, containing, 1. Plaintiff's and defendant's names. 2. The nature of the action. 3. Time, place, and act. 4. The summing up the grievance or conclusion, viz. *Per quod actio accrevit ad exigendum, &c. or unde dicit quod deterioratus est & damnum habet ad, &c.* Brown's Anal. 3. [383]

6. Declaration must be good. 1. *In substance to every intent.* 2. Sometimes by inducement. Doubted, if hurt by surplusage. Brown's Anal. 3.

(B) Good or not. Certainty. In what Cases it must be formal and certain; and what shall be said to be so.

1. **I**T seems by several books, that *nothing* shall be foreprised in *præcipe quod reddat, but that which lies in demand by præcipe quod reddat.* Br. Demand, pl. 40. cites Tempore E. 1. and Fitzh. Brief, 866.

2. And

2. *And therefore advowson shall not be foreprised in præcipe quod reddat ; for præcipe does not lie thereof. Ibid.*

Ld. Raym.
Rep. 191.
Palch. 9
W. 3. Per
the Powells
Justices,
and says,
that *ejec-*

3. *Trespass in uno tenemento with a toft adjacent, containing four acres of land, there it was agreed, that this word tenementum is uncertain, but because the four acres shall be intended to be the tenement, as here, therefore well, otherwise it is in a demand. Br. Demand, pl. 27. cites 3 H. 4. 17.*

ment de uno tenemento, is ill for the uncertainty, because in that action the thing itself must be recovered, and tenementum may signify a thing for which ejectment will not lie, as an advowson, &c. but in trespass, where damages only are recoverable, the word will serve well enough.

4. *In debt the plaintiff counted upon an obligation made at D. where it bore date at the manor of D. and yet well by the best opinion ; for the manor of D. may be in D. and may extend into D. C. and E. and then at the manor of D. shall be uncertain. Br. Lieu, pl. 4. cites 34 H. 6. 1.*

5. *Where a man demands land, he shall shew the certainty of the acres ; but where he brings debt upon a lease or trespass, e contra ; for in the one case he shall recover the land, and in the others not, and so no plea to the bill. Br. Brief, pl. 244. cites 36 H. 6. 26.*

6. *If the manor of B. extends into B. and S. and is demanded by name of the manor of B. in B. he shall recover only that which is in B. and some e contra, and that foreprise shall be made, quære. Br. Demand, pl. 50. cites 9 E. 4. 17.*

7. Declaration must be *certain*, containing, 1. *Such a sufficient certainty whereby the Court may give a peremptory and final judgment upon the matter in controversy.* 2. *That defendant may make a direct answer to the matter contained therein.* 3. *That the jury, after the issue joined, may give a complete verdict thereupon.* 4. *No blank or space to be left therein.* Brown's Anal. 3.

8. *Though the rule of law is, that declarations shall not be taken by intendment, but ought to have certainty ; yet this has an exception and a meaning, viz. That where the uncertainty is so great, that it is indifferent to take it either way ; but where one way is more strong, and the intendment this way much exceeds the intendment the other way, such intendment shall be allowed, and declarations shall be adjudged good by such intendment. As in debt against an heir, the count shall be good, notwithstanding the plaintiff does not shew that the executors have no assets ; for it shall be intended ; because it shall be presumed, that otherwise the plaintiff would not have brought his action. Pl. C. 193. a. b. 1 Eliz. Wrotefley v. Adams.*

[384] 9. A declaration ought to contain two things, viz. *Certainty and verity* ; for that is the foundation of the suit whereunto the adverse party must answer, and whereupon the Court is to give judgment. Co. Litt. 303. a.

10. In the Book of Entries is set forth, that *trespass was brought for heaps of stones*, without mentioning any certainty ; cited Arg. But Doderidge said, that the counsel who cited it, never

never saw an action for a heap of stones; but *perhaps it might be for a cart-load, or the like, of stones.* Palm. 447. Hill. 2 Car. B. R. in case of Clapham v. Middleton.

11. An action of *trespass* was brought *quare testas diversas (Anglice) (earthen pots) ipsius querentis cepit.* And moved that it is naught for the uncertainty, and so was the opinion of the Court, as 5 Rep. 34. *Trespass* was brought *quare pisces suos cepit*, without shewing the number, or what nature they were, and therefore naught. Noy. 91. Mich. 2 Car. B. R. Clapham v. Middleton.

12. Action *sur le case*, and declares that *whereas A. was indebted to him 20s. & ultra B. in consideration he would forbear it, promised to pay him.* After verdict, judgment was arrested, because of the uncertainty of the sum in the declaration. Frea. Rep. 443. pl. 601. Mich. 1676. Canfon's case.

13. In case against a physician, it is sufficient to say, *that he administered physick unskilfully, &c. without shewing the particular defect in his skill.* Per Holt Ch. J. in delivering the opinion of the Court. Lord Raym. Rep. 471. Pasch. 11 W. 3. in the case of Groenvelt v. Burwell, & al'.

14. In case for negligently managing his ship, that it run over the plaintiff's barge. The plaintiff declared, *that he was possessed of a barge laden with diverse goods and merchandizes generally, &c.* The declaration is too general, and the particular goods ought to have been mentioned, as in case of burning a house of goods, or otherwise no damages shall be recovered; per Holt Ch. J. at the sittings at Guild-Hall. Hill. 2 Ann. Martin v. Henrickson. 1 Salk. 287. pl. 22. Martyn v. Henrickson. S. C. accordingly.

(C) Good. Pursuant to a Defective Deed.

1. **A**NNUITY, the plaintiff counted upon a grant bearing date *anno dom. 1200, &c.* and not *anno dom. regis*, and execution taken, and the count awarded good, because it pursues the deed. Br. Count, pl. 41. cites 24 E. 3. 53. 54.

2. In annuity the count was, that the prior of M. in Southwark, granted to the plaintiff in London, such a day and year, &c. & *profert hic in Curia the writing afore said, whose date is in the Chapter-House of the said house*, which cannot be intended to be made in L. because the Chapter-House is in S. which is another county, judgment of count, and yet good. Br. Count, pl. 60. cites 5 E. 4. 6.

3. For Danby Ch. J. Laycon and Brian, the Chapter-House is where the chapter assembles; for the ancient Chapter-House may be thrown to the ground, and then where they make their congregation in another house, this is their Chapter-House for the time, and the prior and covent may come into London and seal the deed there. Ibid.

4. But it was held, that where the deed bears date at a place [385] certain,

Declaration.

certain, as above, it shall be intended that it was made there, if special matter be not shewn to the contrary, as where obligation bears date 1 May, and acquittance 2 May, and the obligation was not delivered till 4 May, this special matter shall be alleged to avoid the acquittance, and so in the case supra. Br. Count, pl. 60. cites 5 E. 4. 6.

(D) Good.

Without setting forth what will make against himself.

1. **ANNUITY** granted by R. till he promoted the plaintiff to a benefice, the plaintiff counted of simple grant and of arrearages for five years, and well, without making mention of the condition, and the defendant may say, that it was granted till he was promoted, &c. and that he tendered to him a competent benefice, and the plaintiff refused, and the plaintiff need not say, that he is not yet advanced, because the condition goes in defeasance of the annuity, and in his dis-profit which shall come of the part of the defendant to shew, but where annuity is granted, if the grantee does such act, there the plaintiff shall shew the performance of the act, for by this his annuity commenced. Br. Count, pl. 43. cites 14 H. 7. 31. and 15 H. 7. 1.

(E) Declaration. Repugnancy, or Surplusage.

1. **ERROR** to reverse a judgment given in the Court of Hull, in an action on the case, where the plaintiff declared that he was seised of a messuage, and that the defendant built another near it, and continued the said building from such a day to the time of the levying of the plaint, by reason whereof he stopped up his lights & adhuc obstupavit. There was judgment for the plaintiff and entire damages given; and now the error assigned was, that by reason of the words *adhuc obstupavit*, damages were given for something after the plaint levied. To which it was answered, that the word *adhuc* doth refer only to the time of bringing the plaint, and not to any thing which happens afterwards; it is to shew, that the defendant has not abated the nuisance; they are words only of form, and used in most declarations, viz. *Solvere contradixit & adhuc contradicit*, &c. And so are the pleadings in the entries in this very case, viz. that the defendant built a new house, by reason whereof the greatest part of the plaintiff's house magna tenebritate obscurata fuit & adhuc existit; and for this reason the plaintiff had judgment. 4 Mod. 152, 153. Mich. 4 W. & M. in B. R. Carter v. Calthorp.

2. *Trespass* for taking and carrying away his timber and brick, *super terram suam jacent' erga confectionem domus de novo edificat'*.

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edificat.' And the Court held this insensible, for they could not be materials towards the building of a house already built. Sed quære, if that was not surplusage? 1 Salk. 213. in pl. 4. cites Hill. 8 W. 3. B. R. Lawley v. Arnold.

* 3. In *covenant against an apprentice*, the plaintiff assigned for breach, that the apprentice before the time of his apprenticeship expired, et durante tempore quo servivit, departed from his master's service; the defendant demurred and had judgment, because the declaration was repugnant, for it should have been *durante tempore quo servire debuit*. 1 Salk. 213. pl. 4. Trin. 10 W. 3. B. R. Nevil v. Soper.

(F) Amended. At what Time.

1. **T**HE defendant pleaded to the count, by which the plaintiff amended it, and defendant pleaded to it again for other default, and the plaintiff amended it again, and so it seems that in one and the same term, the defendant may plead several times to the count. Br. Count, pl. 4. cites 3 H. 6. 19. Br. Charters, pl. 1. cites S. C.

2. Holt Ch. Justice declared, that by the course of the Court a man may amend his declaration the *second term*, but that when the declaration is amended, *new rules for pleading must be given*; for the plaintiff perhaps must thereby be put to a new defence. 11 Mod. 198. Mich. 7 Ann. B. R. Withers v. Baker.

3. Declaration was allowed to be amended after issue joined and notice of a trial, in a case, where the nature of the action was not thereby changed. Gibb. 193. Hill. 4 Geo. 2. B. Dukes of Marlborough v. Wigmore.

(G) Abated.

1. **I**N trespass, the writ was to the damage of 40s. and the count 40l. damages, by which the defendant demurred upon the count. Per Thorpe this is a good cause to abate the count. Pl. 34. cites 38 E. 3. 21.

2. In quare impedit, the King counted upon two presentments, by which the defendant pleaded it in abatement of the count, et non allocatur, contra in case of a common person. Br. Count, pl. 27. cites 43 E. 3. 14.

3. In account against a man as his bailiff and receiver in Kirby, the defendant said, that there are two Kirbies in the same county, and the plaintiff counted in Kirby Skirke, and therefore the defendant pleaded it to the count not warranted by the writ, et non allocatur. Br. Count, pl. 28. cites 44 E. 3. 1.

4. In trespass against one N. and one W. the plaintiff first counted against N. and he pleaded not guilty, and after the plaintiff counted against W. that he with N. did the trespass at another day than was supposed in the first count, and W. pleaded in bar, and at another

term W. would have abated the count for the *variance between the two counts*, and was not received, inasmuch as he was a stranger to the last count. Thel. Dig. 193. Lib. 13. cap. 1. S. 6. cites Mich. 46 E. 3. 25.

[387] 3. Trespas of battery in *Middlesex*, and the plaintiff counted in the palace of *Westminster*, where the sheriff has no jurisdiction, and per Marten the count shall abate; for it is *infra* and *not de*; for the palace is no part of the county, for process shall issue immediately from the Court to the warden of the palace, and not the sheriff; and therefore he cannot direct mandate to the warden as in case of a liberty within the county. Br. Count, pl. 77. cites 2 H. 6. 7.

6. Count shall not abate for *surplusage*. Per Rolfe. Br. Count, pl. 10. cites 9 H. 6. 25.

7. Nor for want of form, if it has matter sufficient. Ibid.

8. If writ of dower, or the like, be brought of a manor, and four acres of it are in the *Cinque ports*, all the writ shall abate, if the demandant does not make forprize; per Taverner. Br. Brief, pl. 246. cites 36 H. 6. 32.

9. In forcible entry, the count did not express the certainty of the land, as *twelve acres of land, four acres of meadow, &c.* and therefore the writ was abated, and here see always that for default in the count the writ shall abate. Br. Count, pl. 54. cites 38 H. 6. 1.

10. In an action upon the case for beer and wages, the defendant pleaded in abatement, et pet. *judicium de billa et quod billa prædicta cassetur for uncertainty in the declaration*; upon demurrer the defendant's counsel insisted upon many faults in the declaration, et per Cur'. the defendant shall not take advantage of mistakes in the declaration upon a plea in abatement; but if he would do that, he must demur to the declaration, per quod a respondeas ouster was awarded. 1 Salk. 212. pl. 1. Pasch. 4 W. & M. in B. R. *Haftrop v. Haftings*.

(H) Declaration. Necessary in what Cases.

1. ENTRY in the quibus against two, the one appeared at the grand cape, and the other made default after default; there the demandant shall not count, for he shall not count against him who comes by the grand cape, before he has saved his default, quod nota. Br. Count, pl. 48. cites 14 H. 6. 3.

2. But where it is brought against three, the one always appears, and there makes default after default, and the third appears at the grand cape, there the demandant shall count against him who always appeared, that he with the others disseised him, and against the other pray seisin of the land. Ibid.

Br. De-
mand, pl.
63. cites S. C.

3. Scire facias in dower, the tenant made default, yet the demandant shall make his demand; for the writ does not comprehend

hend certainty, contra in præcipe quod reddat, causa patet. Contra in affise by default. Br. Count, pl. 55. cites 38 H. 6. 18, 19.

(I) Necessary. Though Defendant makes Default.

1. **T**HE demandant shall not count *against the prayee in aid in præcipe, quod reddat*, but he *shall have oyer of the writ and count, which was made against the tenant for life*, and so he had, and vouched. Br. Count, pl. 6, 7. cites 11 H. 4. 11.

2. If *affise is taken by default*, yet the plaintiff shall make plaint; for the writ *does not comprehend certainty, quod nota*, and the same *in dower, quod nota*; contra in *præcipe, quod reddat*. Br. Plaintiff, pl. 6. cites 38 H. 6. 18.

And says, it is the same in all offices. [388]*

3. In *waft*, when the defendant makes default at the grand distress, or in a *quare impedit*, or in an *avowry*, in such cases the plaintiff ought to count; but he has no occasion to count of a year and day; for the defendant in one case, and the plaintiff in the other, where such default is, has no day in court to make a defence; but in both cases a good title ought to be shewn. Jenk. 124. in case 51.

(K) De Novo.

In what Case the plaintiff may declare De Novo.

1. **F**ORMEDON *against baron and feme, the demandant counted, and after the baron made default, by which petit cape issued, and the baron made default again, wherefore the feme came and prayed to be received, and pleaded to the count, because no esplees were alleged in the ancestor of the demandant, scilicet, in the donee*, and it was well argued, whether the demandant should count anew, and it is said there, that Mich. 4 H. 6. the demandant counted anew; for it was said, that it was *new tenancy given by the statute*, and *new tenancy shall have new count*, and at the *petit cape if the demandant releases the default*, the demandant shall count anew. Quod nota. Br. Count, pl. 7. cites 3 H. 6. 41.

2. And if the plea be without day by protection, there at the *resummons*, the demandant shall count anew. Quod nota. Ibid.

3. And *against vouchee*, the demandant shall count anew, *mutatis mutandis*. Ibid.

4. But it is said elsewhere, that the *prayee in aid, nor the garnishee, shall not have but oyer of the count*. Ibid.

5. In *detinue* the *garnishee* shall have oyer of the writ; but it was said, that the plaintiff shall not count anew against him; nota. Br. Count, pl. 35. cites 8 H. 6. 16.

6. If the plaintiff counts in *debt or trespass*, and the defendant pleads to the jurisdiction, the count shall not be entered before the jurisdiction

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jurisdiction be affirmed, and if continuance be taken till the next term, it shall be upon the writ, as if no count had been, and at the next term the plaintiff shall count anew. Br. Count, pl. 36. cites 8 H. 6. 18.

7. *Præcipe quod reddat* against tenant for life, who prayed aid of him in reversion, who appeared gratis and joined in aid, and the demandant counted anew against the tenant and the prayee, and they vouched the common vouchee, and suffered recovery for assurance, and yet it is said, that the prayee shall not have but *oyer of the count*. Br. Count, pl. 87. cites 22 H. 7.

[389] (L) Where a Second Declaration may vary from the Former.

1. *SCI. fa. was tenend' de nobis & hæred' nostris*, and the prayee in aid cast protection, and after the year the plaintiff sued re-garnishment, which was *tenendum de dicto patre nostro*, and the defendant pleaded to the writ for the variance ; & non allocatur ; for all is of one and the same effect. Br. Variance, pl. 11. cites 40 E. 3. 18.

But if he was nonsuited before declaration in the replevin, he may count at large. Br. Variance, pl. 2. cites S. C.

2. If a man brings replevin, and declares, and is nonsuited after declaration, so that certainty may appear, and brings second deliverance, he cannot vary in it, in year, day, place, or number of acres, or the like. Br. Second Deliverance, pl. 3. cites 3 H. 6. 9. Per opinionem Curiz.

(M) Double.

1. *TRESPASS*, because the devisor was possessed of a lease for years by deed indented, and devised to the plaintiff, and died, and the executors bailed to him, and the defendant took it, and carried it away, and the defendant demanded judgment of the count, because he alleged the devise and the bailment of the executors, and so double, & non allocatur ; for it is conveyance, and so well. Br. Count, pl. 14. cites 27 H. 6. 8.

2. The plaintiff declared, that whereas the defendant, 6 Maii 1695, for 120 weeks diet then past, had promised to pay him 7s. per week, and that the plaintiff postea, viz. 5 Maii 1695, having found the defendant diet 120 weeks then past, the defendant promised to pay the worth, and that it was worth 7s. per week ; upon non assumpsit and verdict pro quer' it was now moved in arrest of judgment, that the weeks in the quantum meruit are not said to be alia than those laid in the special promise ; so that the defendant is twice charged for the same thing. Sed non allocatur ; for they do not appear necessarily to be the same, and without necessity, the Court will not intend them to be the same. 1 Salk. 213. pl. 3. Mich. 9 W. 3. B. R. West v. Troles.

(N) Aided

(N) Aided by Intendment.

1. **I**N replevin where a man makes avowry, or counts for annuity granted for term of his life, to be steward of the manors of A. B. and C. and says, that he exercised the office, it suffices, though he does not say in all the manors; for it shall be so intended. Br. Count, pl. 62. cites 5 E. 4. 104.

2. The plaintiff declared *a lease made by one Christmas, the 6th of May anno 7, of one messuage, &c. in D. by reason whereof the plaintiff* entered, and was possessed, until the defendant afterwards, viz. 18th of the same month, anno sexto supradicto, did eject him.* And not guilty being pleaded, a verdict was found against the plaintiff. And Yelverton moved in arrest of judgment, (to save costs) that the declaration was insufficient. For that action was grounded upon two things; first, upon the lease; secondly, upon the ejectment, and both these ought to concur one after another; and in this case the ejectment is supposed to be a year before the lease made; for the lease is anno 7, and the ejectment supposed to be anno 6, and therefore the declaration naught. And Yelverton vouched the case of *POWRE V. HAWKINS* anno septimo termino Pasch. Where the plaintiff declared upon the lease of Edward Ewer, 27 April, anno sexto, and laid the ejectment to be 26 April, anno 6, and the Court held then, that the declaration was naught; yet in the case in question, the declaration was adjudged good, and the word (sexto) to be void, for the day of the ejectment being the 18th of the same month of May, it cannot be intended but to be in the same year, in which the lease is supposed to be made; by the opinion of the whole Court. Brownl. 146. Mich. 8 Jac. Davis v. Pardy.

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Yelv. 182.
Davis v.
Purdy.
S. C. and
Brownl.
seems only
a translation
of Yelv.

(O) Aided by Intendment. As to the place where the Thing is supposed to be done, there being two several Counties, &c. to which it may refer.

1. **D**EBT in the county of N. and declared upon an obligation made at H. Rolfe demanded judgment; for H. extends into the county of N. and into the county of L. and the plaintiff has not declared in what part of the will the obligation was made, & non allocatur; for it shall be intended in the county of N. by the bringing of the writ there, as where there are two vills of one and the same name in two counties, and he brings his action in the one county, and counts there, and does not say in which county, yet it shall be intended in the county where the writ is brought, per Cur. by which he passed over. Br. Count, pl. 6. cites 3 H. 6. 35.

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2. That

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2. That which is alleged by way of conveyance or inducement to the substance of the matter, need not be so certainly alleged, as that which is the substance itself. Co. Litt. 303. a.

3. Where a matter of record is the foundation or ground of the suit of the plaintiff, or of the substance of the plea there it ought to be certainly and truly alleged, otherwise it is where it is but conveyance. But the proceedings and sentences in the Ecclesiastical Courts may be alleged summarily, as that a divorce was had between such parties, for such a cause, and before such a Judge, and concurrentibus hiis quæ in jure requiruntur; for the Judge must be alleged, to the intent the Court may write to him if it be denied. Co. Litt. 303. a.

[391] (P) Names. By what Names Things must be demanded, the Nature of them being changed from what they formerly were, as Lands into Houses, &c.

Br. Avowry, pl. 84. cites 39 H. 6. 7.—Br. Demand, pl. 14. cites 39 H. 6. 8. S. C.

1. **R**ECORDARE, the defendant avowed because the dean and chapter of N. held two houses, four acres of land, two acres of meadow, twenty acres of pasture, and four acres of wood of the father of the defendant, whose heir, &c. by certain rent and services, and for so much arrear he avowed, and the dean and chapter joined to the plaintiff, because they had leased to him for term of years yet continuing, and both joined, and said, that before the taking B. was seised of two yard lands there, of which the place where, &c. is parcel in fee, and by deed, which he shewed, made before the statute of quia emptores terrarum, and before the statute de religiosis, and after time of memory gave the two yard lands to the dean and chapter, and their successors, to hold by fealty, and less rent for all services, which estate the donor of the avowant had in the seignory, and demanded judgment if for more services he ought to avow, and because the house, meadow, land-pasture, and wood, cannot be intended to be two yard lands; therefore the plaintiff, by the best opinion of the Court, shewed the houses were built after the gift, and that parcel was approved into wood, and part into meadow, and part into pasture, &c. so that it may appear to be all one and the same thing, for it cannot be demanded now, but by name as it is now, quod fuit concessum, quod nota. Br. Pleadings, pl. 60. cites 39 H. 6. 8.

(Q) Special; though the Writ is general. And Vice Versa.

1. **A** MAN may have writ of nuisance of a mill levied, &c. And in his count say, that it is a wind-mill, or a water-mill. Thel. Dig. 87. Lib. 9. cap. 7. S. 33. cites 4 E. 3. 150.

2. In

2. In *replevin* the plaintiff may count of divers several takings at divers days. Thel. Dig. 87. Lib. 9. cap. 7. S. 31. cites Pasch. 10 E. 3. 508.—And so he may at divers places. Ibid. cites Pasch. 29 E. 3. 30.

3. In *formedon* the writ was upon a gift, and the gift maintained by the count, by which it was shewn that the land was deviseable by testament, and that donor devised in tail, &c. and held good, and the tenant compelled to traverse the devise, and not the gift. Thel. Dig. 86. Lib. 9. cap. 7. S. 1. cites Mich. 15 E. 3. Brief. 324. And says, that so may a man maintain by recovery in value. Ibidem.

4. In *quare impedit* by the King of disturbance made to present to the chapel of B. and so was the commencement of the count, and afterwards in the count the King made title for his tenant to present a covenable parson to an abbey, and that the abbot ought to present this parson to the ordinary, &c. and inasmuch as the chapel was void, and the heir within age, the King presented to the abbot, and he refused, &c. and held a good special count, and special disturbance. Thel. Dig. 86. Lib. 9. cap. 7. S. 3. cites Mich. 24 E. 3. 39.

5. In *trespass* the writ was, that the defendant had committed [392] diverse extortions and oppressions, and the count was, that he had committed extortions and grievances, viz. imparked their beasts, and detained them till they made several fines, and distrained them per sovent distress, by which, &c. and held good. Thel. Dig. 86. Lib. 9. cap. 7. S. 4. cites Hill. 31 E. 3. 335.

6. In *trespass* the writ was, quare asportavit bona et catalla, and the count was de quinq; dolis vini and held good. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites Trin. 39 E. 3. 24.

7. But where the writ is bona & catalla, a man shall not count de denariis. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites 39 E. 3. 30. And that so agrees Trin. 46 E. 3. 16.

8. But a man shall count well of ten quarters of barley. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites Trin. 46 E. 3. 16.

9. So of dead trees, and corn. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites 43 E. 3. Brief 569.

10. So he shall not count of live chattles. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites 13 H. 6. Trespass, 70.

11. In writ of error by heir in special tail per formam, &c. By the writ he may be supposed heir general, and shew debors how he is special heir per formam, &c. to this land, notwithstanding that his father has another general heir. Thel. Dig. 86. Lib. 9. cap. 7. S. 9. cites Hill. 3 H. 4. 17.

12. The writ was general upon the statute of labourers for departing out of the service of the plaintiff, and counted specially that he covenanted with him to serve him in the office of carpenter, and held good. Thel. Dig. 86. Lib. 9. cap. 7. S. 13. cites Mich. 11 H. 4. 33.

13. Writ of custodia terræ & hæred' shall be general and the count special. But in writ of ward of the land only, it shall be quod reddat custodiam tot acrarum terræ. Thel. Dig. 87. Lib. 9.

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cap. 7. S. 29. cites Pasch. 11 H. 4. 64. and that so agrees the Register, fol. 161.

14. In trespass the writ was, *quare cepit piscem*, and the count was of diverse fishes, and adjudged good; for *piscis is nomen collectivum*. Thel. Dig. 86. Lib. 9. cap. 7. S. 15. cites Hill. 4 H. 6. 11.

15. In every writ founded upon the case all the special matter ought to be put in the writ; for it is not sufficient to have general writ and make special count. Thel. Dig. 87. Lib. 2. cap. 7. S. 27. cites Trin. 7 H. 6. 47.

16. In action upon the case against one, who was retained, by the plaintiff, to be of his counsel to buy a manor for the plaintiff in such a county, which defendant had falsly, and in deceit, &c. purchased the manor to himself, &c. The writ was abated because it did not appear by the writ of whom the manor should be bought, notwithstanding that it was shewn by the count. Thel. Dig. 87. Lib. 9. cap. 7. S. 28. cites Mich. 16 H. 6. Action sur lo Case, 44.

17. In writ of entry forcible, upon the statute of anno 8 H. 6. the writ was of entry into divers lands and tenements, and the count also, by which it abated; for the count shall be certain. Thel. Dig. 87. Lib. 9. cap. 7. S. 30. cites Mich 38 H. 6. 1.

18. In writ of entry upon the statute of Rich. The writ was, *quod ingressus est diversa terras & tenementa*, and by the count the certainty of the lands appeared, and it was held an ill writ, and yet the defendant passed over. Thel. Dig. 86. Lib. 9. cap. 7. S. 19. cites Pasch. 4 E. 4. 19. and says see 38 H. 6. 1. & 5 E. 4. 26. & Register 182.

19. In debt by the heir of cesty que use for rent, arrear upon a lease for years made by his ancestor, he ought to make special count, and shew how the ancestor made feoffment to his use, and after leased. Thel. Dig. 87. Lib. 9. cap. 7. S. 21. cites Trin. 21 H. 7. 25. per opinionem.

[393] 20. Where feoffment is made in fee to the use of the feoffor in tail after the statute of 27 H. 8. The writ of formedon for the issue shall be that the feoffees gave to the feoffor in tail, and in the count the special matter shall be shewn, but where A. infeoffs B. in fee to the use of a stranger in tail, the issue of cesty que use shall have formedon, that the feoffor gave to cesty use in tail, and the count shall be special. Thel. Dig. 87. Lib. 9. cap. 7. S. 23. cites 7 E. 6. Plowd. 59. Agreed by Mountague.

21. So where feoffment in fee is made to the use of the feoffor for life, and afterwards to the use of B. in tail; before the said statute, and after the said statute the tenant for life had died, and B. discontinued and died; his issue in writ of formedon shall say that the feoffor was donor, &c. and the count shall contain all the special matter with short mention of the execution of the estates by the said statute. Thel. Dig. 87. Lib. 9. cap. 7. S. 24.

22. And Bromley Ch. J. was of opinion that the demandant might count generally, and if the gift be traversed, maintain the count by the special matter in the replication. Thel. Dig. 87. Lib.

Lib. 9. cap. 7. S. 25. cites 1 M. 1. and Br. Formedon, pl. 46. 49. and says see 42 E. 3. 6.

(R) In Real Actions. Names. By what Names Things shall be demanded.

1. **D**EMAND was of a *rod of land*, and the writ awarded good. Br. Demand, pl. 22. cites 3 E. 3. and Fitzh. Brief 740. Br. Demand, pl. 38. cites S. C.

2. *Mortdanceslor* was brought of *eight feet of land in breadth, and six in length*, and good, notwithstanding that he did not say of a place containing so many feet. Br. Demand, pl. 41. cites 6 E. 3. and Fitzh. Brief 650.

3. A *carve of land* is good, per Herle; for it was said there, that carve is a common demand. Br. Demand, pl. 37. cites 6 E. 3. 42. and Fitzh. Brief. 730. Br. Demand, pl. 31. cites S. C. but because it was of an acre where it was a carve, therefore the writ was abated.

4. Where assise is brought of *the Hospital-House*, there is no other plaint, but *de uno mesuagio cum pertinentiis*; for he cannot have it of a chapter, or such like. Br. Demand, pl. 15. cites 8 Aff. 29. Br. Assise, pl. 138. cites S. C.

5. *Therefore* quære if a man *disseises a parson of his church* unde querela erit facta? Ibid.

6. *Hospital or chapel*, the demand or plaint in assise of them, shall be per nomen *mesuagii*. Br. Demand, pl. 29. cites 8 Aff. 29.

7. *Mortdanceslor* was challenged because *two parts of the moiety of a mill was demanded*, which is a third part of the whole, judgment of the writ & non allocatur. Br. Demand, pl. 17. cites 11 Aff. 20.

8. *And* a demand of *a moiety of the moiety of one carve of land*, is a good demand. Ibid.

9. *Præcipe quod reddat* lies of an *oxgange of land*; contra of an *oxgange of marsh*; for this *cannot be ploughed*, quod nota præcipe of one oxgange of land. Br. Demand, pl. 23. cites 13 E. 3. and Fitzh. Brief 241.

10. In assise the plaint was of a *place containing 40 feet in length, and twenty in breadth*, and found for the plaintiff, and he recovered, and yet Pasch. 15 E. 2. Plaint of a croft was amended; for it was said that * præcipe quod reddat does not lie of a croft. Br. Demand, pl. 18. (bis) cites 14 Aff. 13. S. P. But demand of a place of land without certainty is not good. Br. Demand, pl. 34. cites 16 E. 3. and Vet. N. B.—S. P. Br. Demand, pl. 4. cites 9 H. 4. 3.—Br. Plaints, pl. 3. cites S. C.

11. A *selion of land* is no good demand as it seems; for it was refused in a foreprise. Br. Demand, pl. 40. cites Tempore E. 3. and Fitzh. Brief 866.

12. *Tenement* is no term to demand a house, but in trespass of nuisance

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nuisance to it, there tenement is a word sufficient; per opinionem, &c. Br. Demand, pl. 54. cites 11 H. 7. 25.

13. In writ of forfeiture of marriage, the count was, that the ancestor died in his homage, &c. And the defendant said, that the ancestor made feoffment, &c. Absque hoc, that he died in the homage, &c. And the plaintiff said, that this feoffment was made to the use of the ancestor and of his heirs, &c. And held a good maintenance of the count by this special matter. Thel. Dig. 87. Lib. 9. cap. 7. S. 22. cites Pasch. 27 H. 8. 3.

For more of Declaration in general, see the several Titles of Actions throughout this Work, and other proper Titles.

Decree.

(A) Bound by Decree; who Parties, or not Parties.

1. **A** DECREE was against the lessee, and all claiming under him; he surrenders to him in reversion, and he was adjudged to be bound by the decree for so long time as the lease should have endured. Toth. 123. 23 and 24 Eliz. Chapman v. Biffow.

2. If an infant suffers a decree by consent, it is for ever reversible, but otherwise of an adversary bill. 2 Freem. Rep. 127. pl. 147. Trin. 1667. Anon.

3. A decree by consent for a lease, or other personal estate, shall bind purchasers, or otherwise the Ld. Keeper said, you will blow up the Court of Chancery. 2 Freem. Rep. 127. pl. 148. Trin. 1667. Windham v. Windham.

4. Several causes were brought to hearing together, where some that were parties to one bill were not so to another; Finch. C. on hearing of them, said, the justice which was to be done on them all appeared, and it was decreed accordingly, and you shall not sever them now, and so decreed against one that was no party to that suit. 2 Chan. Cases, 234. Trin. 29 Car. 2. Turney v. Daws and Mayor.

5. An order that defendant shall take no advantage at the hearing for want of proper parties is void in itself and cannot take away the defendants just exceptions unless it had been by consent. Arg.

Arg. Vern. R. 122. pl. 112. Hill. 1682. Curfon v. the African Company.

* 6. A person indebted to testator's estate in 10000l. by mortgage not party to a suit having *notice* of a decree *by being present at the hearing*, &c. by which decree a co-executrix was to receive no more money, and the other co-executrix was to have a perpetual injunction against her, and a clause was inserted in the order, that no creditor should pay her any more money; but before any thing further done thereupon, the mortgagor paid the 10000l. to the co-executor, and who delivered him up his mortgage to be cancelled. Upon a bill by the other co-executor, against the mortgagor for *repayment* of the 10000l. and he having full notice, and it being pure voluntary payment to avoid the decree of the Court, it was decreed per Lord Nottingham. Vern. 57. Trin. 34 Car. 2. Harvey v. Mountague.

7. None are *bound by a decree* but such as are *parties* to the suit. 2 Vern. 113. pl. 109. Mich. 1689. Natchbull v. Porter. Vern. 291. S. P. Finton v. Macclesfield (E. of)——S. P. by the Master of the Rolls, and as to the parties themselves, it cannot be pleaded in bar, unless it binds both parties. Barnard. Rep. in Chan. 77. Palch. 1740. in case of Atkinson v. Turner.

8. *But decree* 5 Car. 1. that *all the miners* within the parish of D. as well for the time being, as to come, shall pay to the vicar for *tithe of lead bar*, the tenth dish cleaned. Per Cur. the decree *extends to* all miners within the parish, then or hereafter, so the defendants are within the letter, and expressly bound by the decree, and as long as the decree stands in force must obey. 2 Vern. R. 184. pl. 166. Mich. 1690. Brown v. Booth.

9. A bill was brought by some few of Greystock manor, *against the lord to settle the customs of the manor, as to fines* upon deaths and alienations; and an *issue was directed* to be tried at law, and found that upon the death of the lord or tenant, there was due an uncertain fine, but not exceeding a twenty-penny fine, that is twenty years old rent; and upon alienation of the tenant, a fine altogether uncertain and arbitrary; and it was insisted upon, that there being but some of the tenants parties to this bill, the rest would not be bound by this trial; but my Ld. Keeper held they would; he said, he remembered the case of Nether-wiersdale, between Ld. GERRARD and some few of the tenants, and Lord NOTTINGHAM'S CASE, in the Duchy, concerning the customs of Daintree manor for grinding and baking at the lord's mill and bakehouse, and said, in these and a hundred others, *all were bound, though only a few tenants parties*; else where there are such numbers no right could be done, if all must be parties, for there would be perpetual abatements; and it is no maintenance for all the tenants to contribute; for it is the case of all; and in the Exchequer and duchy it would certainly be so, and no difference when it is here, and he cited Sir William BOOTHBY'S CASE in the Duchy last Michaelmas term, where a bill concerning the custom of grinding at the lord's mill was amended, and made to be on behalf of the plaintiffs, and all the rest of tenants; and as to the objection,

objection, that the Courts of Exchequer and Duchy are courts of revenue, and go by other rules than ordinary courts of equity; he said, that was of no weight, and held that all must be bound here as well as there. Equ. Abr. 163. cites Mich. 1701. Brown v. Howard.

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(B) Bound by Decree. What.

1. **D**ECREED, that conusee of a *statute* entered into by the father, for performance of an agreement with the plaintiff to pay him so much per ann. till, &c. should hold the land *against* his heir, *an infant*, and his guardian, till he be satisfied his debt and arrears. N. Ch. R. 45. 1649. Morton v. Kinman and Poplewell.

2. By the laws of England a decree (notwithstanding any contempts thereof) shall *not bind the goods* or moveables, but only charge the person. Chan. Rep. 193. 12 Car. 2. Howard v. Suffolk.

3. A decree in Chancery is of the *like nature with a judgment* at common law. Chan. Rep. 234. 14 Car. 2. Nanney v. Martin.

It is as effectual to charge the person, as an execution at law. 2 Chan. Rep. 193. 32 Car. 2. Elvard v. Warren.

(C) In what Cases.

1. **T**HIS Court is cautious to make a decree *without a precedent*. Chan. Rep. 240. 15 Car. 2. Roberts v. Wynn.

N. Ch. R. 1. 2. No decree *pro confesso* till after appearance. 3 Ch. R. 22. Hill. 1667. Moyser v. Peacock.

3. Where there is a remedy at law for one thing in a bill which is complicated with other matters which are proper in equity, in such case equity will determine the whole matter; per Lord Chancellor. 2 Freem. Rep. 58. in pl. 64. Trin. 1680.

4. Where there is but *one witness against defendant's answer*, the plaintiff can have no decree. Vern. R. 161. pl. 151. Pasch. 1683. Alam v. Jourdon.

(D) Stayed or avoided, or barred; by what; and how.

1. **K**. V. the plaintiff mortgaged a college lease to F. the defendant, who was let into possession of the profits. Afterwards F. assigned to N. V. the son of K. V. the plaintiff; and on a bill by K. V. F. was decreed to account for the whole time, though N. V. the assignee was no party. Afterwards F. not being able to perform this decree, brought a bill against K. V. * [and N. V.] setting

* Nelf. Chan. Rep. 60. S. C. accordingly. 3 Chan. Rep. 178. S. C. but S. P. does not

setting forth a fraud and practice between them, and that he was willing to account to the time of the assignment, and to comply with the decree as far as he was able, and prayed that N. V. might account from the time of the assignment. Then N. V. exhibited another bill against his mother, claiming the original lease by a title paramount her's, and it appearing that he had such a title paramount, F. was discharged of the decree against him. Chan. Cases, 2. 3. Trin. 12 Car. 2. Venables v. Foyle.

2. Upon a bill of review the question was, whether a copyhold estate, devised to be sold by the executor to pay debts, and afterwards sold accordingly, should be assets at law and in equity, or at law only; for if only at law, then a decree which makes them assets in equity, without a trial at law, is erroneous; and it was held, that the decree could not be reversed, because it cannot now appear, whether upon the proof it appeared to be matter of law or equity; and after a decree, it shall be intended, that the Court adjudged on the whole proof, according to the purport thereof. Hard. 174. Mich. 12 Car. 2. Fanthaw's case. [397]

3. Plaintiff sues as sole, and after marries, and then a decree is made, yet it is not erroneous. Chan. Rep. 232. 14 Car. 2. Cramborne v. Delmahoy.

4. Decree avoided by original bill upon matter subsequent to the decree. Chan. Cases, 64. Hill. 16 & 17 Car. 2. Cocker v. Bevis.

A former decree cannot be set aside by original bill, unless in case of apparent fraud. Per Lord Ch. Talbot. See Cases in Equ. in Lord Talbot's time. 201. Trin. 1736. Galley v. Baker.

5. General words not particularly applied shall not shake a decree. Chan. Cases, 218. Hill. 23 & 24 Car. 2. Roscarrick v. Barton.

6. Bill to set aside a decree and sequestration for payment of money, the plaintiff having a title by statute-waple, and judgment prior to the exhibiting the now defendant's bill, on which they obtained their decree, and the decree was set aside accordingly. Fitz. 126. Mich. 26 Car. 2. Witham v. Bland.

7. Upon a demurrer to a scire-facias-bill to have execution of a decree, the defendant pleaded, that he was a purchaser without any notice of the decree, and that a fine with proclamations was levied, and five years passed without claim. Ld. K. Finch inclined to think that it should bar the decree, and seemed to continue of the same opinion, but said, that he would consult with the Judges, and hear the case argued. Freem. Rep. 311. pl. 381. in Chancery. Giffard's case.

8. Where a decree is temporary, or for special ends, an original bill lies to put a period to it, and to shew the purposes of the decree satisfied, said to have been resolved. Chan. Cases, 251. Hill. 26 & 27 Car. 2. in case of Whorewood v. Whorewood.

in case of the Mayor and Burgesses of Coventry v. Ld. Craven.

appear.—
a Freem.
Rep. 151.
pl. 197.
S. C. ac-
cordingly.

See 9 Mod.
6. Trin. 8
Geo. Mayor
&c. of Co.

ventry, and Lord Craven.

See tit. Ba-
ron and
Feme, (X.2)
pl. 12. in
the notes
S. C. cited
9 Mod. 6.
Ld. Craven.

9. Where

9. *Where no ordinary process upon the first decree will serve for the execution thereof*, there must be a new bill to pray execution of the first decree by a second decree. 2 Chan. Rep. 127, 128. 29 Car. 2. Lawrence v. Berney.

But other-
wise of
agreement in
writing.
Lev. 197.

10. Verbal agreement though subsequent to the decree, yet shall not stay the execution of it but the remedy must be by original bill. 2 Chan. Cases. 8 Mich. 31 Car. 2. Waklin v. Walthall.
in case of Middleton v. Shelly, cites it as decreed in Ld. Coventry's time in Bonham Norton's case.

11. *After a decree of dismissal affirmed on appeal to the lords*, a bill is brought for discovery of a deed said to be burnt, pending the appeal which made out the plaintiff's title; so that after such discovery, the plaintiff might apply to the lords for relief. Defendant demurred, but was ordered to answer, but the plaintiff to proceed no further without leave of the Court. Per Jeffries C. Vern. 416. pl. 396. Mich. 1686. Barbone v. Searle.

12. Where there is a decree it cannot be altered but by bill of review, but where there is only a dismissal, an original may be brought upon a new equity; Arg. says it is an allowed difference. Vern. 417. pl. 396. Mich. 1686. in case of Barbone v. Searle.

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13. A rule, that whenever a decree is entered by consent, the merits after shall never after be enquired into, unless there be an objection, that the word consent be struck out of the order. MS. Tab. February 1702. Norcot v. Norcot.

14. An original bill, barely in nature of a bill of revivor, and not broader or longer than a bill of revivor only, does not open the first decree, to have it looked into; but if it be to enforce a decree, or carry it further, then it opens the cause. Pasch. 1706. Abr. Equ. Cases, 83. Vare v. Wordall.

15. *Bill to redeem after a decree of foreclosure signed and inrolled 1697, suggesting fraud and surprise in obtaining the decree, and a parol declaration before and after the decree, that the mortgagee was willing to take his principal interest and costs, and quit the estate*; the defendant pleads the decree of foreclosure, and by answer denies the fraud, &c. Several witnesses were read in the cause to prove such a parol declaration by the mortgagee, that he was willing to quit the estate upon payment of what was due to him, and that the plaintiff and defendant in the former cause had the same clerk in court, &c.

Per Harcourt C. the plaintiff comes too late after such a length of time to be let in to redeem. I know no instance where a man has been let in to redeem by a new bill after a decree of a foreclosure signed and inrolled upon any parol agreement or declaration, or by reason of over-value of the estate; such a thing would be of dangerous consequence and shake abundance of titles; perhaps there may be an instance of relief upon a bill to redeem after a decree of foreclosure, but then the bill was brought in a very short time after the decree, and there must be some extraordinary circumstances in the case, but I do not remember any such case of relief. Bill dismiss with costs, and afterwards decree affirmed

affirmed in Dom. Proc. MS. Rep. Pasch. 12 Ann. in Canc. Wilhall v. Short.

16. The defendant Conyers in 1712, brought a *bill against the now plaintiff Hicks and Mary* his wife, who was *the widow and executrix of B. for an account of the estate of B. and obtained a decree, and then Mary died, and before the decree was inrolled the now plaintiff Hicks petitioned for a re-hearing, and at the same time preferred an original bill suggesting new matter come to his knowledge since the decree, and obtained an order to re-hear the former cause at the hearing of this cause, &c.*

The plaintiff's counsel admitted, that the decree in the former cause was just and right upon the pleadings and proofs in that cause, but insisted, that upon the pleadings in the present cause, the merits appeared otherwise, and therefore prayed a new decree, in favour of the now plaintiff, and to set aside the former decree.

Per Cowper C. it is irregular to bring a new bill to alter and vary a decree already pronounced. It is true the defendant in this court may bring a cross bill, before any decree pronounced in the original cause, and if the original cause is heard before the cross cause, the decree in the original cause may afterwards be varied by the decree in cross cause, but in that case, the cross bill must be brought before any decree made in the original cause. By the course of the Court, if the original decree had been inrolled, the now plaintiff upon affidavit of new matter come to his knowledge, since the former decree, *might have a bill of review*, but he cannot now be relieved against the former decree by this new bill and re-hearing the former cause; for the decree is right upon the pleadings and proof in the cause, and therefore cannot be varied upon a re-hearing; and the now plaintiff cannot be relieved upon his new bill, because it is *contrary to the course of the Court to alter a decree upon a new original bill exhibited after the decree pronounced*. The bill dismissed and the former decree affirmed. MS. Rep. Trin. 2 Geo. in Canc. Hicks v. Conyers.

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17. Decree, *before inrollment thereof, ought to be delivered to the adverse party or his attorney, who are in eight days to return the same signed by the council of that side, or to make their objections to the draft*. MS. Tab. March 6, 1720. Cheevers v. Geoghegan.

18. *The same decree gives liberty to try the title at law, and yet awards injunctions to put plaintiff into possession and quiet him in his possession; reversed as repugnant*. MS. Tab. April 28, 1721. *Ld. Laneborough v. Elwood*.

19. What might have been *supplied by motion* is no objection to a decree. MS. Tab. Nov. 24, 1721. Banbury v. Bolton.

20. Assignee of a mortgage (by circumventing of the mortgagor) got possession by ejectment the next term after the mortgage forfeited, and after brought a bill to foreclose, and *by false affidavits got the cause to be heard ex parte, and a decree and report thereupon signed and inrolled; afterwards the mortgagor died, and his heirs brought a bill to redeem; and the defendant*

Gilb. Equ. Rep. 185. S. C. That the decree was signed and en-rolled in 1701, and in 1708 the

plaintiff's father died, and the plaintiff continued an infant till 1709, when he came of age; in 1721, and not before, he brought an original bill to set aside this decree, and be let into a redemption, on payment of principal interest and costs, suggesting that the defendant was much over paid, and the lands were of greater value, and that all the proceedings in the decree were ex parte, and that the service of the subpoena to hear judgment, was only on the clerk in court, on affidavit that the plaintiff was out of England, which affidavit was false, and that there had been no service at all of the order for making the decree absolute, and other irregularities. The defendant answered to part, and pleaded the decree of foreclosure and inrollment, and insisted it would be against practice, to set aside a decree signed and enrolled by an original bill. Lord Chancellor dismissed the bill, but without costs, and laid great stress on the length of time, the plaintiff being of age 12 years before the filing this bill, and seemed to think it reasonable, that bills for redemption against mortgagees ought not to be brought after 20 years possession, but should be barred by the statute of limitations of Jac. 1. as entries are at common law; that in this case, infancy of the plaintiff would not help him, the right to redeem not beginning in his time, but in his ancestor's, and in all such cases the party was barred, and had not 10 years after the impediment was removed.

the assignee pleaded this decree and report, and both made absolute, signed, and inrolled. *Ld. C. Macclesfield* said, that all the circumstances of fraud ought to be answered, and the decree being signed and inrolled the plaintiff has no other remedy, and over-ruled the plea that it should not stand for an answer. And it being objected, that according to this rule a decree might be *set aside by an original bill*; his lordship replied, that such a *gross fraud* as this was an *abuse on the Court* and sufficient to set any decree aside. 2 Wms's Rep. Trin. 1722. *Lloyd v. Mansell*.

21. Ordered, that no application shall be made against the minutes after a week; and no further time to be allowed to petition for a re-hearing but within a week after that. *Sel. Cases in Canc. in Ld. King's time.* 21 Trin. 11 Geo. 1. *Anon.*

22. On a new bill to carry a decree into execution, Court may vary and alter what is thought proper; but on a re-hearing, no further than the petition extends; but if the petition be against the decree in general, though particular reasons are given, the whole is open; but otherwise it is, if the petition be only against one or two particulars. *Sel. Cases in Canc. in Ld. King's time,* 13, 14. Pasch. 11 Geo. 1. *Colchester v. Colchester.*

23. The rule of Court is, that on appeal the whole cause is open; but on a re-hearing, only so much as is petitioned against; if all do not petition, it is open only to the petitioners. *Sel. Cases in Canc. in Ld. King's time.* 24 Trin. 11 Geo. 1. *Hayward v. Colley.*

[400] 24. On appeal the party may bring new matter, but aliter in review, unless there be a clause to receive it, *Sel. Cases in Canc. in Ld. King's time.* 48 Trin. 11 Geo. 1. in *Popping's case.*

25. Decree may be altered upon proper application the same term it is pronounced without a re-hearing. *MS. Tab. May 3d, 1725.* *Vaughan v. Blake.*

26. No original bill can be to vacate a decree signed and inrolled. *G. Equ. R. 185.* *Hill. 12 Geo.* *Floyd v. Mansell.*

27. Matters, proper to be excepted to upon the masters report; shall never be objected to a decree after the report confirmed. *MS. Tab. April 28, 1726.* *Parker v. Stanley.*

28. All appeals from the Rolls are to be made to the Lord Chancellor, and decrees made at the Rolls must be signed or approved

proved of by the Chancellor to make them decrees of the Court of Chancery. MS. Tab. March 13th, 1727: *Morse v. Dubois.*

29. A decree gained by fraud may be set aside by petition, as well as a judgment at law by motion; *a fortiori* may such decree be set aside by bill. 3 Wms's Rep. 111: Pasch. 1731. *Seldon v. Fortescue Aland.*

30. If a decree be obtained and inrolled, so that the cause cannot be re-heard, then there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on matters subsequent thereto, as a release, or a receipt discovered since. 3 Wms's Rep. 371: Trin. 1735. *Taylor v. Sharp.*

(E) Of the Inrolment of Decrees; and of Caveats to prevent the same.

i. A DECREE pronounced in the testator's life-time, not to be passed under the seal by the executor. Toth. 127. cites Pasch. 1634. *Ewer v. Frere.*

A decree was made, but the party died before inrolment, yet it was ordered to be inrolled. 1 Chan. Cases, 227. Hill. 28 & 29 Car. 2. Anon.

Decrees take effect from the time the judgment was given, and the death of the parties ought not to hinder the inrolment in some convenient time. Fin. Rep. 169. Mich. 26 Car. 2. *Clapham v. Phillips.*

2. A decree was ordered to be inrolled, if the party died before. Cited *ibid.* 74. by name of *Sabine v. Allen.* Easler. 3 Ch. R. 27: 22 Feb. 20 Car. 2. *Labyne v. Alley.*

3. T. an administrator obtained decree; and died *intestate.* The inrolment was stayed; for the title of T. as administrator is gone. 2 Chan. Cases, 247. Hill. 30 and 31 Car. 2. *Warren v.*

4. On a motion for a re-hearing a cause decreed, signed and inrolled by the late Lord Chancellor, Ld. Keeper North asked Serjeant Maynard, if he knew any law whereby he could justify the re-hearing a cause signed and inrolled by his predecessor? for that was to vacate a record. The Chancellor, or himself, was master of his own inrolment, and might on his memory know no reason for re-hearing of it, but he could not do it, unless there was some surprise or other irregularity in the inrolment of it; but he said, he had a privy seal that enabled him to sign and enroll the decrees pronounced by his predecessor. Vern. R. 131. pl. 117. Hill. 1682. Anon.

5. If a caveat be entered to stay the signing and inrolling a decree, it stays the signing 28 days not only after pronouncing the decree, but from the time of the decree's being presented to the great seal to be signed; in order to its inrolment, and notice thereof given by the Lord Chancellor's secretary to the clerk in court of the other side. Wms's Rep. 609. Hill. 17:9. Allowed by Lord C. Parker, though at a former day he seemed to disapprove it, till it was confirmed not only by the Master's Report, but also

by a certificate of the greatest number of clerks in the office.
Burnet v. Theobald.

(F) Reversal. Error.

1. **A DECREE** was reversed, though there was no new matter; but the case on which it was founded was mistaken. Toth. 129. cites Trin. 3 Car. Durham (Bp.) v. Martin.

2. Bill of review to reverse a decree 22 Jac. The plaintiff for error says, the cause was referred to four commissioners, and but three certified; and also, that the lease, which the plaintiff now insists on, was not then in issue, and the plaintiff never consented to the certificate. Upon reading the process it appeared by depositions of two witnesses, that there was an agreement for settling the differences, and in regard the decree was so long since, and nothing done against the same in all this time, being sixteen years, this Court would not reverse the decree. Chan. Rep. 139, 140. 15 Car. 1. Goddard v. Goddard.

3. Pending a reference to a master to take an account of the suit abated by death of one of the defendants afterwards. The master proceeded in the account, and made his report, and the same was decreed and enrolled near twenty years since. On a bill of review, this was held no error, or cause of reversal. Chan. Cases, 122, 123. Hill. 20 and 21 Car. 2. Slingsby v. Hale.

4. It is no error for the Court to decree for the defendant to hold free of equity of redemption on the plaintiff's bill; for circuity of action is to be avoided, and there are many precedents of decrees in this manner for the defendant. Chan. Cases, 122. Hill. 20 and 21 Car. 2. Slingsby v. Hale.

5. A stranger, that is bound by a decree gotten by fraud, may falsify it; per Lord Keeper. Ch. Cases, 152. Mich. 21 Car. 2. in case of Style v. Martin and Bosville.

6. A decree ought not to be made to bind the inheritance, where there has been but one trial at law; per North. K. Vern. 293. Hill. 1684. in case of Fitton v. the Earl of Macclesfield.

(G) Opened, or amended, &c.

1. **A MISTAKE** in a decree was amended. Toth. 129. cites Hill. 14 Car. E. of Devonshire v. Leake.

[402] 2. Sir George Downing brought an appeal in the House of Lords from a decree made in the Court of Chancery, as by consent, suggesting, that though the register, in drawing up the order, had drawn it as a decree by consent, (and the minutes were so too) yet he never did consent to such decree nor his counsel neither; or if they did, it was without his authority, and made affidavit of it; but the appeal was dismissed. Eq. Abr. 165. pl. 4. cites Hill. 1699. Downing v. Cage.

3. Where

3. Where *facts appearing on the decree as drawn up and inrolled, they are plainly erroneous*; the decree was opened. Chan. Prec: 260, 261: pl. 211: Trin: 1706: Grice v: Goodwin.

4. Where matters have been examined in equity, and determined; the Court will be *cautious of unravelling former decrees, agreements; or releases*: Wms's Rep. 723, &c. pl: 208. Trin. 1721: Cann v: Cann.

(H) Performante of a Decree. Inforced How:



1. **O**NE in the Fleet was ordered to be *ldid in irons*; because he *refused to perform a decree*. Toth. 129. South v. Gardiner.

2. *Fine was imposed for breach of a decree*: Toth. 166. cites Trin. 6 Car. Longman v. Hopgood.

3. A *defendant lay in the Fleet for breach of a decree*; the plaintiff nevertheless *prefers a bill to discover an estate*; defendant demurred because a double execution; yet over-ruled: Toth. 137, 138: cites Hill: 1633. Audley v. Harris.

4. An original bill *to execute a decree of lands* against a purchaser, who claimed under parties bound by that decree, was allowed good on demurrer thereto; per Lord Keeper. Chan. Cases; 231. Trin. 26 Car: 2. Organ v. Gardiner.

5. A *sequestration* may be granted in the Exchequer, as it has been always practised in Chancery *where a decree is for a personal duty*, otherwise the jurisdiction of the Court of Equity would be to little purpose, if it had not authority sufficient to see its decrees executed; per three Barons; but the Lord Ch: Baron doubted, because the Lord Ch. Baron Hale could never be prevailed upon to grant it, nor the Lord Montague; to whose learning, he said, he must greatly subscribe; but by the opinion of the other three it was granted. 2 Freem. Rep. 99: pl. 109. Trin. 1687, in the Exchequer. Guavers v. Fountaine.

For more of Decree in general, see **Chancery**, and other proper Titles.



Deeds.

(A) The different Operations of the several Sorts of Conveyances.

Where the use of a fine or feoffment is limited to the **1. BY feoffment or fine** all uses and possibilities are conveyed by reason of the forcible operation of it; but it is otherwise by bargain and sale. Le. 33. pl. 60. Mich. 15 Eliz. Anon.

right heirs of the feoffor or conveyer, it was held by Anderson, Periam, Walmesley and Fenner J. and Popham, then attorney general, and Coke, now attorney general, that this is a remainder and not a reversion; for that the fine or feoffment was a determination of all the *old uses* in the feoffor or conveyer, and the limitation upon the fine or feoffment is to be said all new. But upon conference of all the Judges of England, all the others held, that it was a reversion, and the old uses not destroyed. Mo. 289. pl. 437. Pasch. 33. Fenwick v. Metforth.

Le. 182. pl. 256. Pasch. 31 Eliz. S. C. And by Gawdy, this feoffment to his right heir is merely void; to which Wray agreed, as if he had made a feoffment to the use of one for life, without any further limitation. And. 288. pl. 297. Milford v. Fenwick. S. C. adjudged per tot. Cur. that the lease was good; because the fee simple remained in the lessor, and was as a reversion; for it cannot take effect in the heir of him who limits it, unless by descent. S. C. cited 2 Rep. 91. b.

They ransack the whole estate, and pass or extinguish, &c. all rights, conditions, powers, &c. belonging to the land, as well as the land itself. Per Hale. Vent. 228. King v. Melling. But yet this does not bar his heir at law, but he may enter notwithstanding. Per Trevor, Ch. J. 21 Mod. 151.

2. *Bargain and sale* is not so strong a conveyance as a *livery*; as if I have a rent charge in right of my wife out of the manor of D. and afterwards I purchase the manor, and afterwards, by deed indented and inrolled, I bargain and sell the manor; the rent charge shall not pass. Arg. Le. 6. pl. 10. Mich. 25 and 26 Eliz. in the Exchequer, in the case of Stoneley v. Bracebridge.

3. *At common law*, before the 27 H. 8. of uses where the use was limited upon *covenant to stand seised*, there could not but one person only and his heirs be trusted with the land, so that by the taking a wife, acknowledging a statute, dying without heir, or making a forfeiture, the use was destroyed or prejudiced; but upon *estate executed*, a man might have trusted several together, so that the estate might survive, and the trust continue in others after his death, and the land not be subject to his incumbrances. Also if a man will limit use upon covenant, he ought to have *effeetual consideration*; but upon estate executed, he may limit use without consideration; upon covenant he ought to have a deed, but upon estate executed, not. Upon covenant he cannot reserve a power to make leases, jointures, or to prefer younger children, but upon estate executed he may. Arg. Mo. 381. pl. 506. Mich. 36 and 37 Eliz. in Perrot's case.

4. Baron

4. Baron and feme are jointenants of a term. The lessor infeoffs the baron, who dies seised. The wife survives and claims the term. But held that by the acceptance of the feoffment, the baron had surrendered the term and it is *extinguished*. But if the conveyance had been by *bargain and sale inrolled*, or by *fine*, it had been otherwise. Cro. E. 912. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

5. A *bargain and sale* does not *pass away*, or affect a *contin-* [404]
gent use in the bargainor. But a *feoffment* or *fine* would transfer it. This case
Hale Ch. B. cites Hughes's Rep. in 27 & 28 Eliz. case 40. [but is in 1 Le.
seems misquoted.] Hard. 416. Pasch. 17 Car. 2. in Scacc. in 33. pl. 40.
case of Edwards v. Slater. at Serjeant's
Inn. Anon.
For by con-

veyance by feoffment, or fine, all uses and possibilities had been carried by reason of the conveyance
operation of it,

6. Power to charge land with 2000l. is *destroyed* by fine or feoff- Lev. 237.
ment, but not by *lease and release*; per Bridgman K. Chan. S. C. in
Cases, 105. Pasch. 20 Car. 2. Jenkins v. Kemis. Case.

7. By a *lease and release* nothing passes but what lawfully may pass without hurt or damage to another; for it cannot divest a fee and thereby gain a fee to convey; Arg. Pollex, 91. 22 Car. 2. cites [Mich. 10 Jac.] 96. Seymour's case.

8. As, if a man has an *estate in fee upon condition and conveys it over by lease and release*, the releesee can have but an estate upon condition. Ibid. 92.

9. So if a man has an estate to him and his heirs, as long as J. S. has heirs of his body, and he conveys his estate by lease and release, the releesee must be bound by this limitation. Ibid. 92. 22 Car. 2. Arg. in case of Carpenter v. Smith.

10. A *feoffment* being a common-law-conveyance, and executed by livery, makes a *transmutation of estate*. But a conveyance by the statute of uses, as a *covenant to stand seised*, &c. makes only a *transmutation of possession* and not of estate; because no estate passes by those conveyances, but only an use. L. P. R. 609. cites 2 Lev. 77. 1 Vent. 378. [Trin. 24 & 25 Car. 2. B. R. in case of Pibus v. Mitford.]

11. There is a great difference between a *conveyance at common-* Twissden, J.
law, and a conveyance to *uses*; at common-law the heir cannot said, he
take where the ancestor could not; but it is otherwise in case of saw no dif-
uses. Per Wyld J. Vent. 373. Trin. 26 Car. 2. B. R. in case ference be-
of Pibus v. Mitford. tween a
feoffment to
uses, and a

covenant to stand seised; for if a feoffment be made to the use of one for life, the use, which is not disposed of, shall return, as well as upon a covenant to stand seised. Ibid. 376.—Per Hale Ch. J. in all cases touching uses, there is a great difference between a feoffment to uses, a covenant to stand seised, and a conveyance at common law. If a man by feoffment to uses conveys land to the use of A. for life, he may remit the use to himself and the heirs male of his body by the same deed, and so alter that, which before was a fee simple, and turn it into another estate. But if A. gives land to B. for life, remainder to A. and the heirs male of his body, the remainder is void, because a man cannot give to himself. For a man cannot convey to himself by a conveyance at the common law. Ibid. 377, 378.

12. *Surrenders* (of copyholds) must be construed as deeds. Per Holt Ch. J. 11 Mod. 58. Pasch. 4 Ann. B. R. In case of Idle v. Coke.

(B) How to be taken where they may operate several Ways; or where they cannot take Effect as the Parties intended.

Lessor. by the words *dedi & concessi* 1. A DEED comprehending *dedi & concessi* was pleaded as a *feoffment*. Arg. Godb. 128. cites 21 and 22 H. 6.

dedi & concessi & *consequi*, conveyed to the *lessor* and his heirs, with letter of attorney to make *livery*, per *Anderbon*, Cin. J. he may take it as a *feoffment*, or a confirmation; and it was held a good *feoffment*. Goldsb. 25. pl. 6. Trin. 28 Eliz. *Leonard's case*.

[205] 2. *Bargain and sale* may be pleaded as *release* or *confirmation*. See D. 116. b. 172. a. pl. 71, 72. Pasch. 2 & 3 P. & M. *Idgrave v. Lee*.

3. A. and B. were *joint-tenants* of land charged with rent of 20l. per ann. to the King, who in consideration of money, &c. paid by B. by patent granted, *remised, released and renounced* to B. and his heirs the said rent, habend' & percipiend' *reditum prædictum* to B. and his heirs. B. devised this rent to J. S. Per *Dyer*, the tenant may use the patent as he please, either as a *grant* or *release*, and he, having devised the rent, has declared his election. D. 319. b. pl. 16. Mich. 14 and 15 Eliz. *Anon.*

4. A. levied a fine, and declared the use to A. and his heirs, until he, his heirs, &c. should make default in payment of 20l. a year to B. at every Michaelmas, till 800l. be paid; and after such default, until B. and his heirs shall have received so much as shall be arrears; and after the said debt so paid, then to the use of A. and his heirs for ever. Afterwards A. bargains and sells the land to J. S. and afterwards default is made of payment, and B. enters, and after the money is paid. It was held by the Judges, that B. is not stopped, but that he shall have the land again, notwithstanding the indenture of bargain and sale. For at the time of the bargain and sale, he had an estate in fee, determinable upon a default of payment, which estate only passed by the indenture of bargain and sale, and not the *new estate* accrued by the latter limitation after the debt paid; for that was *not in esse* at the time of the bargain and sale. But if the conveyance, instead of bargain and sale, had been by *feoffment* or *fine*, it had been otherwise; for that would have carried all uses and possibilities, by reason of the forcible operation of it. Le. 33. Mich. 27 and 28 El. at *Serjeant's Inn*, pl. 40. *Anon.*

Le. 92 93. 5. *Feoffment* to *lessee* for years in possession is good, though it be by deed, and he may take *livery* after the delivery of the deed, and shall be deemed to be in by force of the *feoffment*, although the lessee may take the deed by way of confirmation, and then the *livery* is but surplusage and void. Ow. 7. the third resolution. Trin. 28 Eliz. C. B. in case of *Haverington, alias Hamington, v. Rider*.
—S. P. and the law expects till he has declared his pleasure, and when he has made his election to take it by *livery*, it shall be a *feoffment* in title, and

and by the delivery of the deed in the mean time nihil operatur. Godb. 140. pl. 170. Trin. 25 Eliz. C. B. Leonard v. Stephens. — 3 Le. 128. pl. 180. Leonard's case. Trin. 28 Eliz. C. B. the S. C. & S. P. held accordingly, per tot. Cur. — Ow. 1. S. C. adjudged a good feoffment. — Gouldib. 25. pl. 6. S. C. the Court held the feoffment good clearly.

6. The lord releases and grants his feignory to the husband, who is seised of the tenancy in right of his wife to him and his heirs. The husband dies, and his heir distrains for the rent upon the lands. It was held, that it shall enure as a grant, which is most beneficial to the grantee, and it is agreeing with the intent of the deed, that the husband and his heirs should have it. Cro. E. 163. pl. 3. Mich. 31 and 32 Eliz. C. B. Anon.

7. A. by indenture in consideration of love which he bare to his son, and for natural affection unto him, bargained and sold, gave, granted and confirmed certain land unto him and his heirs. The deed was enrolled; the question was, whether this land should pass? And it was held, it should not, unless money had been paid, or estate were executed; for the use shall not pass. But because the son was then in possession, it was held to enure by way of confirmation. Cro. J. 127. pl. 17. Trin. 4 Jac. B. R. Osborn and Bradshaw v. Churchman.

8. A lease made by virtue of a power reserved on a fine, in construction of law precedes the first estate for life, and all the remainders; for after the lease made, it is as if the use had been limited originally to the lessee for the said term, and then the other limitations in construction of law follow it; and this is the reason that the usual clause in such indentures is, that the convees and their heirs shall stand seised to the use of such lessees, &c. so that in the first case, the lessee derives his estate out of the estate which passes by the fine of the lessor, which he has for life. 8 Rep. 73. Hill. 6 Jac. C. B. in case of Whitlock.

S. C. cited
Mod. 108,
109. Arg.
[406]

9. In judgment of law, ut res magis valeat, executory devise shall precede, and the disposition of the lease, till the contingent happens, shall be subsequent, and so all shall well stand together. 8 Rep. 95. b. Trin. 7 Jac. Matthew Manning's case.

10. If one makes two several deeds, one purporting an estate in fee, the other an estate tail, and they are made to one and the same person, and he brings both the deeds in his hands, and makes delivery of both deeds with the land; by this both deeds shall take effect, and by them estate tail, and also fee simple, shall pass; per Doderidge J. who cited a case in which it was so held. 2 Roll. R. 23. Pasch. 15 Jac. B. R. in case of Thurman v. Cooper.

11. The husband being possessed of a term for 999 years, for good and valuable considerations in the indentures contained, by lease and release, grants, bargains, sells and demises to trustees and their heirs, to the use of himself and his wife for their lives, and the survivor of them; remainder to the heirs of the wife, and covenants that he was seised in fee. The wife dying without issue, made a writing, in nature of a will, and devised it to J. S. and his heirs. It was insisted, that nothing passed by this settlement, for that being a term in gross, no use passed to the trustees by the

Gi'b. Equ.
Rep. 143.
144. S. C.
in locidem
verbia.

27 H. 8. that by the lease for a year, which was only a bargain and sale, no use passed, and there was no attornment to vest it as a reversion, and the release being to enure upon it by way of enlargement of the estate, if nothing passed by the lease, or if that transferred no possession, then there was no estate for the release to operate upon, and that the limitation to the heirs was void, and so a release by her heir at law to J. S. and his heirs could have no effect, and so the term must go to the husband. Per Lord Cowper, though the settlement could not operate as a lease and release, yet the husband being in possession, and the word *grant* being in the release, it took effect as a *grant or assignment of his whole interest at common law*; and though it could not go to the heirs of the wife, yet he should not be admitted after to derogate from it, and therefore should vest in those in whom by law it might, and should go to the administrator of the wife; for as the husband intended to divest himself of the whole fee, had it been a fee, there was no reason that it should not pass when it appeared to be a less interest. Ch. Prec. 480. pl. 301. Hill. 1717. *Marshall v. Frank.*

(C) Operation of Conveyances. Whether by Inrolment, or Livery, or Fine.

*[407] 1. **A** *TENANT in tail, remainder in fee to his sisters, his heirs at common law.* A. made a deed thus, *I the said A. have given, granted, and confirmed for a certain piece of money, &c. without the words bargained and sold; and the habendum was to the feoffee with warranty against A. and his heirs, and a letter of attorney was *to make livery and seisin; and the deed was, to all christian people, &c. The deed was inrolled after the making it.* The deed was indented. Four months after the delivery of the deed the attorney made livery of seisin. A. died without issue, the sisters entered and the feoffee ousted them of the land and they brought trespass, and held for the plaintiff; for here is no discontinuance; for the conveyance is by bargain and sale, and not by feoffment, because the livery comes too late after the inrolment, and then the warranty shall not hurt them, and the deed being indented and the parties seals to it is sufficient. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

But if livery had preceded the inrolment, then that had prevented passing by bargain and sale, and it had passed by the livery. Ar. 1 p. 125. and And. 113. Brice-bridge's case.

2. And per Cur. the words *give for money, grant for money, confirm for money, agree for money, covenant for money*; if the deed be duly inrolled, the land pass both by the statute of uses and by the statute of inrolments, as well as upon the words bargain and sale, and per 3 J. the party ought to take by bargain and sale, and cannot take by way of livery. But when *all is in one deed*, and takes effect equally together, in such case the grantee has *election*. But in this case the bargain and sale (the deed being inrolled) doth prevent the livery, and take his full effect before. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

3. Land

3. Land was bargained and sold, *bargainee levies a fine* of the lands, and afterwards within six months the deed is inrolled; it shall pass by the fine, and the donee shall have the land. For the inrollment shall *relate* to the time of the bargain and sale. 4 Le. 4. pl. 18. Popham's case, If the fine be first, it shall pass by the fine. If the inrollment be first, it passes by the inrollment, or if *livery and seisin* be first, it passes by that. Arg. 2 And. 161. pl. 88.—Ibid. 203. pl. 19. Arg. S. P.—Cro. E. 917. S. P. and cites the case of Lybb v. Hinde.—S. P. by Croke, J. Cro. C. 218, in pl. 2. S. C. there cited.—S. P. by Montague, Ch. J. and said, that if it were otherwise, all assurances would be shaken.—Mo. 837. pl. 456 Trin. 22 Eliz. The Earl of Northumberland's case. S. P. adjudged.—And. 285. pl. 292. Hill. 34 Eliz. Libb v. Hynd. S. P. held accordingly.—4 Rep. 70. b. Hinde's case. S. C. adjudged.—Ow. 70. Arg. S. P.

4. If a bargain and sale be of a *manor*, and *before inrollment*, *livery and seisin* is made of the *demesnes*, and then the deed is inrolled, the *services* do not pass. 2 And. 203. pl. 19. Arg. cites D. Pasch. 25 Eliz. Bracebridge's case. There is no such year in Dyer, nor any such name of a case, but it seems to be the case of Stonely v. Bracebridge, which is in 1 Le. 5. pl. 10. Mich. 25 & 26 Eliz. B. R. and Ibid. 6. Arg. S. P.

5. J. S. seised in fee, levies a *fine* to the *use of himself and his heirs*, until he, his heirs, executors, &c. shall make *default in payment* of 20l. per annum, till 500l. be paid, and *after default to the use of A. his heirs, &c. till the 500l. received of the rents, &c.* and then to the *use of himself and his heirs for ever*; afterwards J. S. by deed indented and inrolled, bargains and sells the land to a stranger; default is made of payment; *A. enters*, and afterwards the 500l. is paid. J. S. shall have his land again, notwithstanding his *bargain and sale before the entry*, for at the time of the bargain and sale he had an estate in fee, determinable upon a default in payment, which accrued to him by the fine and deed of uses between him and A. which estate only passed by the said indenture of bargain and sale, and not the new estate, which is accrued to him by the latter limitation, after the debt paid; for that *new estate was not in esse at the time of bargain and sale*. But if the conveyance by bargain and sale had been by *feoffment or fine*, it had been otherwise; for by such conveyance, all uses and possibilities had been carried by reason of the forcible operation of it. Le. 33. pl. 40. Mich. 27 & 28 Eliz. at Serjeant's Inn, Anon.

6. *Feoffment inrolled without livery* is not of any force to make the land to pass, but the inrollment may *stop* the feoffor to say Not his deed. Agreed per omnes. Poph. 8. Mich. 34 & 35 Eliz. B. R. in case of Gibbons v. Maltyard and Martin. [408]

7. A. bargained and sold lands to B. and his heirs; and the deed *not inrolled*, A. *delivers seisin* of the land, *secundum formam chartae indentat' predict'*. This is a good feoffment. 2 And. 68. pl. 51. Denton's case. Per Walmley, J. he is in by the feoffment, and not by the bargain,

Per Popham, Ch. J. Poph. 49. S. P.—S. P. Arg. and agreed per Cur. Yelv. 224. Hill. 8 Jac. B. R.

8. A. *infeoffed* B. of all his lands in S. and afterwards bargains and *sells* to B. all his lands in S. and covenants to make further assurance

assurance of all such lands as he had bargained and sold to him, whereas by the feoffment A. had not any lands in S. at the time of the bargain and sale, and in debt upon bond for performance of covenants, the not making further assurance was assigned for breach. But for the reason above, the Court held it not well assigned. But if one enfeoffs another of his lands, and afterwards bargains and sells them *by name*, and covenants to make further assurance, he is bound to make assurance accordingly. Cro. E. 833. pl. 3. Trin. 43 Eliz. B. R. Lane v. Hodges.

Brownl.
141, 142.
S. C. and
seems only
a translation
of Yelv.

9. Bargain and sale was made by W. R. *tenant in tail of a house in London* to J. S. and delivered the deed but not on the land, in order to make a tenant to the præcipe to suffer a common recovery; *three days afterwards W. R. made a feoffment to J. S. of the messuage, which was executed by livery and seisin*; adjudged, that the house did pass by the bargain and sale, though not inrolled (for houses in London are out of the statute of inrolment) and not by the feoffment; because it was made to the same person, who had the inheritance of the house at that time, by virtue of the bargain and sale, and a possession executed shall always hinder a possession executory. Yelv. 123. Hill. 5 Jac. B. R. Darby v. Bois.

Per Wil-
liams J. the
fine being
subsequent
to the bar-
gain and
sale, is only
a corrobor-
ation and
confirma-

tion of the bargain and sale. Ibid. 193. — And no alteration at all is made as to remainders. Per Williams J. a Bull. 34. says, it was so adjudged in the Lady Arabella's case. — But it had been otherwise if the fine had been first levied before the inrolment, for there he should take by the fine. Per Williams, J. ibid. cites it as adjudged 4 Rep. 70, 71. in Hind's case, and cites also the case of Willmot v. Knowls. — But if the bargain and sale is made first to B. and before the inrolment the bargainor levies a fine to C. and afterwards the deed of bargain and sale is inrolled. This shall now avoid the fine. Ibid. Per Williams, J.

[409] (D) Conveyances by Lease and Release. And Pleadings thereof.

1. ENTRY, &c. the tenant pleaded lease for years, and release in fee to his possession, and the opinion was, that he shall plead certainly what day the lessor leased, for it may be that it was made to commence four years to come, and then release made mesne is not good, quod nota. Br. Pleadings, pl. 154, cites 32 H. 6. 8.

2. At the common law when an estate did not pass by feoffment, the lessor or vendor made a lease for years and the lessee actually entred, and then the lessor granted the reversion to another, and the lessee attorned, and this was good. Afterwards when an inheritance was to be granted, then also was a lease for years usually made, and the lessee entred as before, and then the lessor released to him,

him, and this was good. But after the *statute of uses*, it became an opinion, That if a lease for years was made upon a valuable consideration, a release might operate upon that, *without an actual entry of the lessee*, because the statute did execute the lease, and raised an use presently to the lessee. Sir Francis Moor, Serjeant at law, was the first who practised this way. But because there were some opinions that where conveyances may enure two ways, the common law shall be preferred, unless it appear that the party intended it should pass by the statute, thereupon the usual course was to put the *words bargain and sale* into the lease for a year, to bring it within the statute, and to allege that the lease was made to the intent and purpose that by the statute of uses the lessee might be capable of a release; but notwithstanding this, Mr. Noy was of the opinion, that this conveyance by lease and release could never be maintained, without the actual entry of the lessee. 2 Mod. 252. Trin. 29 Car. 2. C. B. in case of Barker v. Keete.

3. North Ch. J. said, he had known it ruled several times that a lease and release *in the same deed*, was a good conveyance; for priority should be supposed. Freem. Rep. 251. pl. 266. Pasch. 1678. in case of Barker v. Keete.

(E) Deeds of Conveyance. By Demise and Re-demise.

1. **L**ESSEE re-demises his *whole term* to lessor, *reserving rent*; lessor dies; lessee brings debt against the guardian of the heir of the lessee, who received the profits as *executor de son tort* in the debt and detinet. It was argued, that here is no term in being for any one to be executor de son tort of; for this re-demise was a *complete surrender* in law, and therefore this differs from an assignment made by lessee for years of his whole term to a stranger; for debt will lie on the contract there, because an interest passes to him in reversion, and as to this purpose a term is in esse by the contract of the parties, and so it would be here against the first lessor, who was lessee upon the re-demise; but now because of the surrender, the heir is intitled to enter, and the guardian defendant enters in his right as guardian, which she, being his mother, may lawfully do; so that debt lying only on the contract, the term being gone, the plaintiff can't charge any as executor de son tort in the *debt and detinet*. Had the re-demise been upon *condition*, the surrenderor by entry for *non performance* might have *reversed the term*, and judgment accordingly; and told the plaintiff, he might resort to equity if he thought fit. 2 Mod. 174. Hill. 28 and 29 Car. 2. C. B. Loyd v. Langford. [410]

2. Demise and re-demise are *but one conveyance* in the law, and such conveyance is better than a grant of a *rent-charge*, because all subsequent grants stand on an equal bottom with the first, and therefore if the last grantee make the first *disstress*, he will be first satisfied; therefore this conveyance was found out for the benefit of

of the person who is to have the rent-charge. Arg. N. Ch. R. 169. Mich. 1690. in case of Bladen v. E. Pembroke.

(F) Conveyance Good. Though it cannot take Effect as the Parties intended.

1. **A.** POSSESSED of a term, grants it to *B. and his heirs*, it passes the whole; so to *B. for life* it shall pass the whole interest, and go to his executor. Parl. Cases 206. in case of Jermin v. Orchard, cites Pl. C. 424. and 3 Cro. 534.

2. Baron possessed of a long term for years, conveyed it as a fee to trustees and their heirs for the wife and her heirs, for a valuable consideration. She by will devised the lands to J. S. to whom her heir at law released. The baron claimed it as a chattle as administrator to the wife. But Lord Cowper decreed it to J. S. Ch. Prec. 480. pl. 301. Hill. 1717. Marshall v. Frank.

(G) Bargain and Sale.

Of what Estate, &c. Good, and the Effect thereof.

1. **A.** BY indenture inrolled *bargains and sells* land to B, with a way over other land; the grant of the way is not good; for nothing but the uses passes by the deed, and there cannot be a use of a thing which is not *in esse*, as of a way, common, &c. which are newly created, no use can arise by bargain and sale. Cro. J. 189, 190. pl. 13. Mich. 5 Jac. B. R. Bewdly v. Brooks.

2. The lessor for years did bargain and sell the reversion by deed inrolled to two, and held good. Godb. 272, pl. 381. Pasch, 16 Jac. B. R. Ingin v. Pain, admitted.—
Cro. J. 495, pl. 1. Hingev. Payn. S. C. & S. P. admitted.—
Bridg. 128. S. C. & S. P. admitted.

*[411]

If a man bargains and sells lands, presently the bargainor has actual possession, he may surrender, assign, attorn and release, but he cannot bring trespass. Per Bridgman, Ch. J. Cart. 66. Pasch, 18. Car. 2. C. B. in case of Geary v. Beacroft.

But if the words are bargain and sale for consideration of money, he is in possession upon execution of the deed, to bring trespass; to take a release, &c. by the statute of uses. Wood's Inst. 465.

3. Upon a bargain and sale for years of land whereof the bargainor himself is in possession, and the bargainee never entered; if afterwards the bargainor makes a grant of the reversion (reciting this lease) it is a good conveyance of the reversion, and the estate was vested and executed in lessee for years, by the statute, though not to have trespass * without entry and actual possession. Resolved by the two Ch. Justices and Ch. Baron Cr. J. 604. pl. 32. Mich. 18 Jac. in the Court of Wards. Lutwich v. Mitton.

4. An estate does not pass by a deed of bargain and sale, but only an use. L. P. R. 207.

(H) Bargain

(H) Bargain and Sale of Land.
Good. In Respect of the Manner and to whom.

1. **A** BARGAIN and sale cannot be *to one, to the use of another*; for a use cannot be upon a use; but a bargain and sale may be of land by deed, rendering *rent*, and the reversion will be good. Poph. 81. per Popham Ch. J. cites 36 H. 8.

2. Bargain and sale before, or after the statute 27 H. 8. by deed, for 200l. to B. in fee *to the use of the bargainer for life, &c. or in fee*, or to the use of a stranger, this use so limited is utterly void, for the bargain for money implies in it a use, and the limitation of the other use is merely contrary. And. 37. pl. 96. Mich. 4 & 5 Ph. & M. Tyrrel's case.

Bendl. 61.
pl. 108.
Anon. S. P.
and seems to
be S. C. and
held ac-
cordingly.
—D. 155. 2.
pl. 20. S. C.

in the Court of Wards, and S. P. held accordingly.

3. If after 1 R. 3. *Cestuy que use*, by words of bargain and sale only, had sold the land to a stranger, no possession had passed by this to the vendee but the use only. Mo. 34. pl. 113. Trin. 4 Eliz. C. B. Anon.

4. A. by deed indented and inrolled in consideration of 100l. paid by B. bargains and sells the lands to B. C. and D. parties to the indentures; in this case the lands pass to them all; for although the valuable consideration be expressed to be paid by one, yet it must be intended, that it was paid for them all, to the end, that the land may pass to them all, according to the meaning of all the parties, and a consideration given by one of the parties is sufficient to convey the land to them all. 2 Inst. 672.

5. It must be *by writing*, and not by print or stamp. Secondly, it must be written in *parchment or paper*, and not upon wood, stone, lead, or other material. 2 Inst. 672.

6. If the deed begins *hæc indentura*, or, this indenture, yet, if the deed is not indented, it is no indenture; but if the deed be indented, though the deed does begin, this deed made, without mentioning the word (*indenture*) yet it is a writing within this statute. 2 Inst. 672.

7. A bargain and sale for a valuable consideration of houses, or lands in London, &c. by word only is sufficient to pass the same; for that houses and lands in any city, &c. are exempted out of the act 27 H. 8. and at the common law such a bargain and sale by word only raised an use. And the statute of 27 H. 8. cap. 10. does transfer the use into possession. 2 Inst. 672.

8. If a bargain and sale be void in part it is void in all. Brownl. 37.

9. If in the *habendum* of a bargain and sale of land a trust is declared, this does not make the bargain and sale void, but the conveyance being to the trustees by bargain and sale, it was wisely done to declare the confidence and trust. 10 Rep. 34. a. Mich. 10 Jac. B. R. Per Cur. in Sutton's Hospital's case. [412]

10. If

10. If one makes a bargain and sale to A. and afterwards makes a bargain and sale to B. of the same land, and the deed to B. is first inrolled, but the deed to A. is not inrolled within six months, the bargain and sale to B. is good. But if the deed to A. had been inrolled within the six months, the deed to B. had been void. Per Hobart Ch. J. Hob. 165. pl. 194. Pasch. 14 Jac. Arg.

11. A bargain and sale made by one who is not in possession, nor receives the rents, though it be by deed inrolled in consideration of money is not good, if there be no livery thereupon. (Mich. 23 Car. 2.) But if there be livery it passeth; for the making of the livery puts the bargainee into possession. So likewise if the bargainor enters and takes possession, and then seals and delivers the deed upon the land. But if the bargainor be in possession, or receives the rents, then the estate will well pass by deed inrolled, without livery. L. P. R. 207.

(1) What amounts to, or shall be said a Bargain and Sale.

1. IF be in the reversion upon a lease for years, grants his reversion to his lessee for years, by words of *dedi, concessi, feoffavi*; and a letter of attorney is made to make livery and seisin, the donee cannot take by the livery, for that the lessee has the reversion presently. Per Wray and Catline. 3 Le. 17. pl. 39. Mich. 14 Eliz. B. R. Anon.

2. If lands are conveyed by the word *dedi*; without any words of bargain and sale; and there is a consideration of money, and the deed is debito modo inrolled, the use will pass as well as if the words bargain and sale had been in the deed, because of the money paid. 4 Le. 110: pl. 224. 19 Eliz. B. R. Gray v. Edwards.

3. V. having a rent charge in fee by indenture, which was inrolled within six months, gives and grants it to H. in fee, and there was no attornment. (Nota, in truth the case was, that he for a certain sum of money, gives, grants, and sells the rent, &c. But it was pleaded only, that he by indenture *dedit & concessit*) and it was ruled without any argument, that the rent without attornment passes not, being only by way of grant, and not of bargain and sale, although the deed was inrolled. Cro. E. 166. pl. 2. Hill. 32 Eliz. B. R. Taylor v. Vale.

4. A. the bargainor reciting by indenture, that *whereas J. S. was bound for him in a recognizance and bonds*, he now, for divers good considerations, bargained and sold the lands to him and his heirs; the deed was inrolled within six months, but it was found that no money was paid within the six months. Adjudged, this was not a good bargain and sale, because in every bargain and sale there ought to be *quid pro quo*; but the same might be good by the way of covenant, if there had been apt words, viz: a covenant to stand seised to uses; for if I bargain and sell lands to my son, no use ariseth thereby; but it is a good consideration to raise use by way of

of covenant. Cro. E. 394. pl. 19. Pasch. 37 Eliz. C. B. Ward v. Lambert.

* 5. A *demise and grant* was adjudged to amount to a *bargain and sale*, within the statute of uses. For to make a freehold or inheritance pass by deed indented and inrolled, there need not the precise words of bargain and sale, but words tantamount are sufficient. 8 Rep. 94. Hill. 7 Jac. Fox's case.

a Browal.
291. Small-
man v.
Powis, S.C.
and argued
by all, and
judgment

accordingly.——If the words of a lease are demise, grant, &c. the lessee is not in possession to bring trespass, or take a release to enlarge an estate, &c. till actual entry; but if the words are bargain and sell for consideration of money, he is in possession, upon execution of the deed, to bring trespass, to take a release, &c. by the statute of uses. Wood's Inst. 262.——So the words *alien and grant*, in a deed indented and inrolled, amounts to a bargain and sale, if it be for money, and the land shall pass without any livery and seisin; per Cur. 8 Rep. 94. a. in Fox's case.

6. A bargain and sale is a real contract upon valuable consideration for passing of manors, lands, tenements or hereditaments, by deed indented or inrolled within six months after the date of it, without livery of seisin, or attornment of tenants. 2 Inst. 672.

7. Though it be good to use those words mentioned in the act of 27 H. 8. yet they are not of necessity to be used; for whatsoever words, upon valuable consideration, would have raised an use of any lands, tenements or hereditaments at the common law, the same do amount to a bargain and sale within this statute. 2 Inst. 672.

8. As if a man by deed, inrolled according to this act covenants for valuable consideration to stand seised of lands to the use of another, &c. this is in nature of a bargain and sale within this act. 2 Inst. 672.

9. A. seised of certain lands in fee, demised the same to C. for life, remainder for life, reserving a rent at the feast of St. Michael, and of the Annunciation; A. by indenture, in consideration of 50l. does demise, grant, set, and to farm lett the same lands to B. for 99 years, reserving a rent at the same feasts presently, and C. the lessee for life, did not attorn; and it was adjudged, that the said demise and grant, upon the consideration of 50l. amounted to a bargain and sale of the said term. 2 Inst. 672.

10. So if a man, for valuable consideration by deed indented and inrolled, aliens or grants the land to a man and his heirs, &c. this is a bargain within this statute & sic de similibus. 2 Inst. 672.

11. But inasmuch as the intention of the parties is the principal foundation of the creation of uses, if by any clause in the deed it appears, that the intention of the parties was to pass it in possession by the common law, there no use shall be raised; and therefore if any letter of attorney be in the deed, or a covenant to make livery, or the like, there nothing shall pass by way of use, but, according to the intention of the parties, a possession by the common law. 2 Inst. 672.

(K) Bargain and Sale.
Inrolment by Statute. And by Whom.

It shall be inrolled by the baron only. Br. Ibid. pl. 14. cites 29 H. 8.—The acknowledgment shall be before the recorder, and an alderman, and the feme shall be examined, and shall bind a fine at common law by the custom, and not as a deed only; and it is good without livery of seisin. Br. Ibid. pl. 15. cites 29 H. 8.

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1. **I**N case of a deed made by baron and feme to be inrolled, the feme ought not to be received to make acknowledgment; and such deed shall not be received in Chancery, by reason of the coverture of the feme; though otherwise in London by custom. And error was brought of such acknowledgment taken in C. B. because the Court had no power to take the examination without a writ, but no judgment* was given. See Br. Faits inrol. pl. 3. cites 24 E. 3. 64. and Ibid. pl. 10. cites 5 E. 4. 7.

2. One came to inrol a deed, and Littleton examined him if he was willing, or not; who said, yes. Then he examined his age. He said, he was 26 years old. Littleton bid him be advised; for that if it be inrolled, he could never after say that it was not his deed, nor that he was within in age, nor that it was by duress. Br. Faits inrol. pl. 11. cites 7 E. 4. 5.

3. Bond by baron and feme, during coverture, shall not be inrolled, because it is not the deed of the feme. Br. Faits inrol. pl. 11. cites 7 E. 4. 5.

4. 27 H. 8. cap. 16. S. 1. No lands or hereditaments shall pass whereby any state of inheritance or freehold shall be made, or any use thereof by reason only of any bargain and sale, except the bargain and sale be made by writing indented and inrolled in one of the king's courts of record at Westminster, or within the county where the lands lie, or before the Custos Rotulorum and two justices of peace and the clerk of the peace of the county, or two of them; whereof the clerk of the peace to be one; and the same inrolment to be made within six months after the date of the writings, the Custos Rotulorum, or Justices of Peace and Clerk taking for the inrolment, where the land exceeds not the yearly value of 40s. 2s. viz. 12d. to the Justices, and 12d. to the Clerk; and for the inrolment of such writing, wherein the land comprized exceeds 40s. in yearly value 5s. and the Clerk of the Peace shall inrol the deeds; and the rolls thereof, at the end of every year, shall deliver unto the Custos Rotulorum, to remain in his custody amongst other records of the counties.

5 S. 2. This act shall not extend to lands within any city, borough, or town corporate, wherein the Mayors, Recorders, or other officers, have authority to inrol deeds.

6. Note by the Justices where two jointenants were, and the one aliened all his lands and tenements in D. after the statute of inrolments of anno 27 H. 8. cap. 16. and before the inrolment, the other jointenant died, so that his moiety survived to the vendor, and after the vendor within the half year inrolled the deed, yet nothing passed but

But the moiety; for the inrolment had relation to the making and delivery of the deed; so that it shall give nothing but that which was sold by it at the time of the delivery of the deed, *quod nota*. Br. Faits inrol. pl. 9. cites 6 E. 6.

7. A. seised of lands in fee by indenture dated 4 October for 200l. bargains and sells in fee. It was held, that this deed being inrolled 21 March next following, which was the last day of the six months; accounting *lundr months*, and accounting the said day of the date of the indenture for none of them. And all the last intire whole day of 4 Oct. above shall be accounted in law the day of the date of the indenture; and any part of 31 March which was the last day of the month, shall be said *infra sex menses*. But this was a narrow pinch in the case: D. 218. b. pl. 6. Mich 4 and 5 Eliz: Thomas v. Popham.

8. *The statute of inrolments doth not binder the rising of any uses, but only upon bargains and sales*, which shall not execute by bargains and sales but by indenture inrolled; but all other uses are at the common law, which arise on consideration of marriage, &c. Arg. Cro. E. 345. pl. 16. Mich. 36 and 37 Eliz. in case of Callard v. Callard.

9. Albeit the indenture may be either on parchment or paper, yet the inrolment *must be on parchment only*; and so it is expressed in the clause of inrolment by the Clerk of the Peace, viz. that he shall sufficiently inrol and ingross in parchment the same, and so much is implied when the inrolment is in any of the King's courts of record at Westminster; and so it was adjudged as Mr. Plowden cited it before the Lords in Parliament, anno 23 Eliz. in the great case between HERBERT AND VERNON, which I heard and observed. 2 Inst. 673.

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10. If an *infant bargains and sells lands* which are in the realty by deed indented and inrolled, he may avoid it when he will; for the deed was of no effect to raise an use; and this *statute is to be intended of lawful and effectual bargains and sales*, and such as would have raised uses at the common law, and does only restrain the execution of them that be of no effect, except the deed be inrolled. And this stands with the reason of the common law, that none but effectual deeds ought to be inrolled; and therefore a deed of feoffment ought not to be inrolled before livery. But in case of a fine, the infant must reverse it during his minority; for the consance is taken by force of the King's writ before a judge, and is voidable by the common law. 2 Inst. 673.

11. *A. possessed of a lease for years, bargains and sells it*; the use is executed, and passes *without inrolment*; for it is not within the statute 27 H. 8. of inrolments; but otherwise it is where *A. is seised of land in fee, and bargains and sells a lease for years out of it*; for this ought to be inrolled. Per G. Croke, to which all the Court seemed to agree. 2 Roll. R. 205. Mich. 18 Jac. B. R. Shortgrave v. Rone.

12. It may be inrolled *the same day on which it is executed*. Per Doderidge J. Lat. 14. Mich. 2 Car. in an Anon. case, cites Dal. 4 Eliz.

Vent. 360.
Perry v.
Bowers, S. C.
adjudged
accordingly.—Skinn.
30. pl. 6.
S. C. argued,
but no judgment,
nor any thing
said by the
Court.—
2 Show.
156. pl.
142. Berris
v. Bowyer.
S. C. ad-
judged per
tot. Cur.
that inrol-

13. By the statute of 27 H. 8. 10. *of uses*, the estate passes by the contract, and the use executed by the statute; then comes the *act of inrolment*, cap. 26, of the same year, and *enacts*, that *no estate shall pass without inrolment of the deed indented, and this within six months*. The words are, (unless it be by deed indented and inrolled) not (until) but (unless) and the contract there is with the party that has the estate, and the deed is appointed to be inrolled within certain time, but is otherwise in case of *commissioners of bankrupts*, who have only a power and no estate, and there to pass the estate, there must be not only a deed indented, but the same must be inrolled also, and in that case there is no *relation*; for in this case no time is mentioned within which it is to be done, so that it might extend to 7 or 20 years, which would be dangerous. Adjudged accordingly. 2 Jo. 197. Pasch. 34 Car. 2. B. R. Perry v. Bowers.

ment is necessary before any thing can pass by such deed of assignment, or bargain and sale from the commissioners.—S. P. and when it is inrolled it vests not by the statute of inrolments, but by the statute of uses presently. Hob. 196, in pl. 185. by the two Chief Justices, and Ch. Baron. Pasch. 15 Jac. in Dimmock's case, sent out of the Court of Wards.—Cro. J. 409. pl. 5. S. C. and S. P. held accordingly.

Even after the death of the bargainor. 14. Deed may be inrolled on oath of the execution. 1 Salk. 389 pl. 1. Mich. 8 W. 3. B. R. Taylor v. Jones.
Goodb. 270. pl. 376. Hill. 13 Jac. in Canc. Winchcomb v. Dunch.

15. Where two are parties, the *acknowledgment of one* binds the other. 1 Salk. 389, in case of Taylor v. Jones.

16. If a man lives in *New England*, and would pass lands here in England, they join a meer nominal party with him in the deed, who acknowledges it, and it binds. 1 Salk. 389, in case of Taylor v. Jones, and says, it is the practice.

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(L) Bargain and Sale.

In what Cases the Deed must be inrolled.

1. **A** SEISED of lands in fee makes a lease of lands for years, and after by deed indented bargains and sells the *same lands to the lessee and his heirs, without any word of give or grant* expressed in the deed. Per omnes J. nothing passes by the deed, unless it be *inrolled*, for without inrolment the frankfeignment does not pass, and this is *no confirmation*. Mo. 34. pl. 113. Trin. 4 Eliz. C. B. Anon.

2. Rent paid to the bargainor at the rent-day incurred after the bargain and sale is good, and the bargainee has no remedy, because it is a *thing executed*. Ow. 150. Pasch. 5 Jac. in the Court of Wards, in case of Sir Hen. Dimmock.

3. After the statute of 27 H. 8. cap. 10. of *transferring uses into possession* if a man by his deed had bargained and sold for valuable consideration, any lands, &c. of any *estate of inheritance, freehold or for years*, the same had been executed by the said act of 27 H. 8. cap.

* e Rep.
36. a Pasch.
37 Eliz. in
the Court
of Wards,
S. P. Per

cap. 10. Now this *act of inrolments restrains only estates of inheritance and freehold*; and therefore bargains and sales * for years, for what number soever, are not restrained by this act, though it be not by deed indented nor inrolled. 2 Inst. 671.

Chr. accordingly. If a man is possessed of a lease for

years, and bargains and sells it, the use is executed presently, and passes without inrolment, for it is not within the statute 27 H. 8. [cap. 10.] of inrolments, but otherwise it is if *A. seised in fee, bargains and sells a lease for years out of it*, this ought to be inrolled. Arg. and all the Court seemed to agree to it. a Roll. R. 204. Mich. 18 Jac. B. R. Shortgrave v. Rone.

4. A. in consideration of blood covenants to stand seised to the use of B. his son, and the heirs of his body, and in default of such issue; then to the use of J. S. in consideration of 100l. B. died without issue, the deed was not inrolled; quære if the uses can arise partly by covenant to stand seised, and partly by bargain and sale, or whether it must arise wholly one way, or wholly the other, and not by fractions. Bridgman Ch. J. said in this case there was a mixed consideration, and there needed no inrolment. See Cart. 144. Mich. 18 Car. 2. C. B. Garnish v. Wentworth.

5. Though the inrolment of a bargain and sale shall relate to the delivery of the same deed to avoid mesne incumbrances, yet every bargain and sale, before inrolment, is void, and cannot be made good by any relation, because the bargainee has no estate before inrolment, and if so, he cannot grant any estate. Carth. 178. Hill. 2 and 3 W. and M. in B. R. Bennet v. Gandy.

(M) Bargain and Sale.

Inrolment. At what Time; and where.

1. THE inrolment may be in any of the King's courts of record at Westminster; that is, in B. R. the Chancery, the C. B. and the Exchequer. And though the words be (at Westminster) for that at the time of the making of this act these courts were there; yet if these be adjourned into another place, the inrolment may be in any of these courts; for the inrolment is confined to the courts, wheresoever they be holden. 2 Inst. 673, 674.

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2. Or else in the same county, &c. before the custos rotularum, and two Justices of peace, and the clerk of the peace, &c. 2 Inst. 674.

3. The six months shall be accounted after the computation of 28 days to the month. After the date, and after the day of the date upon this act is all one; so as the date itself is taken exclusive. And yet in the report of Justice Dallison it is said that it was holden anno 4. Eliz. that if it be inrolled the same day it bears date, it is sufficient; but the safer way is to inrol it after the day of date. And yet where it has a date, and is delivered after, it shall take effect to pass from the bargainer from the delivery; for then it became his deed, and not from the date; but the deed must be inrolled within six months after the date. 2 Inst. 674.

A deed may be inrolled the very day of the date, but that is by reason of the intent of the law, and not by the letter. P. r Hobert, Ch. J. Hob. 140. pl. 190. Arg. S. P. 19

Mill. 14 Jac. Norris v. Gentry (Hundred s'.)—See Le. 184. pl. 257.

In replevin the avowant's title was by bargain and sale *inrolled the same day*, which per *Corry* and *Hob.* 140, is well enough, and judgment for the avowant. 2 Kcb. 361. pl. 61. Mich. 21 Car. 2. B. R. *Ligo v. Chiffin*.

If bargainor dies, inrolment after is good. *Gothb.* 270, pl. 376. *Hill.* 13 Jac. in *Cauc.* *Winchcomb v. Dunch.*—*And.* 219, in pl. 245. *Polch.* 32 *Eliz.* S. P. as to the death of either bargainor or bargainee before inrolment, that it is good if it be inrolled within the six months.

4. If the deed indented has *no date*, then the day of the delivery is the day of the date of that deed, and may be inrolled within six months after the delivery. And when the deed is inrolled within the six months, then it passes from the delivery of the deed. And albeit after the delivery and acknowledgment, either the *bargainor or the bargainee dies before inrolment*, yet the land passes by this act; for the words thereof be, no manors, lands, tenements, or hereditaments, shall pass of any estate of inheritance of freehold, except the deed be inrolled. So as by the common law and the statute of 27 H. 8. of uses, it shall have passed. And by the words of this statute when the deed is inrolled it passes ab initio. 2 Inst. 674.

(N) Bargain and Sale. How the Estate is, and what the Bargainee may do before Inrolment.

Before inrolment bargainee bargains and sells over, and after the first

1. IF the bargainee of land after the bargain and sale, and *before the inrolment bargains and sells the same by deed indented and inrolled* to another; and after the *first deed is inrolled within the six months*, the bargain and sale by the bargainee is good. 2 Inst. 675.

deed is inrolled, the second bargain and sale is void. Arg. *Roll. R.* 425. cites it to have been so adjudged. 3 Jac. in *Bellingham's case*.

Arg. *Ow.* 149. cites 10 *Eliz.* *Mocket's case*; and 3 Jac. *Bellingham v. Allop*.—*Cro. J.* 52. Per three J. against two, such second bargain and sale may be good. *Bellingham v. Allop*.—*Nov.* 106. S. C. that it is not good.—S. C. cited *Hob.* 136. pl. 185. and S. P. agreed by the two Ch. Justices and Ch. Baron, that the bargainee cannot bargain and sell to another before his own deed is inrolled.—Bargainee cannot grant over before inrolment. *Carth. Hill.* 2 & 3 W. & M. B. R. *Bennet v. Gandy*.

2. If there be a bargainee of a reversion and the tenant makes *waft*, the bargainee shall not have waft unless the deed be inrolled before the waft committed. Arg. *Ow.* 149. 3 Jac.

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3. Until inrolment the land *remains in bargainor*, for the bargain and sale on the statute 27 H. 8. 16. is but *inchoatum & non perfectum*; for the indenture of bargain and sale gives nothing to the bargainee *till the deed is inrolled* according to the statute. Arg. 3 *Bulst.* 216. *Mich.* 14 Jac.

4. The bargainor, and not the bargainee, shall have *trespass*, or assise before inrolment. Arg. 3 *Bulst.* 216. *Mich.* 14 Jac.

5. Bargainee may *suffer a recovery* before inrolment, and this is warranted by the common practice; *Vent.* 361. *Hill.* 33 & 34 Car. 2. B. R. in case of *Perry v. Bowes*.

(O) Bargain and Sale. Inrolment. Relation.

1. **A** MAN gave in tail, the remainder to the King; the remainder shall not pass without inrolment, and by the inrolment it shall pass a principio, as remainder to the right heirs of W. N. who is alive, and after dies, and so see relation. Br. Relation, pl. 20. cites 1 H. 7. 31.

2. Where a man sells his land by deed indented to one, and after he sells it by another indenture to another, and the last deed is first inrolled and then the first deed is inrolled within the half year, there the first vendee shall have the land; for it has relation to make it the deed of the vendor, and to pass the land from the delivery of the deed; for the statute is that frank-tenement, nor use thereof shall not pass, nor change from one to another by bargain and sale only, unless it be by deed indented and inrolled within the half year; therefore if it be by deed indented and inrolled within the half year it shall pass, as the use might pass at the common law by the sale of land, which was immediately upon the sale. Br. Faits enroll. pl. 9. cites 6 E. 6. Per several Justices,

3. 5 Eliz. cap. 26. S. 1. All inrolments of such writings indented, as are mentioned in the statute of 27 H. 8. cap. 16. of lands, &c. in the counties of Lancaster, of Chester, and the bishoprick of Durham, being inrolled within six months after the date thereof, (viz. those in Lancashire, in the Chancery at Lancaster, or before the Justices of assize there; those in Cheshire, in the Exchequer at Chester, or before the Justices of assize there; and those in the bishoprick, in the Chancery at Durham, or before the Justices of assize there) shall be as good in law, as if they were inrolled in any of the courts at Westminster.

4. S. 2. This act shall not extend to lands in any city, or town corporate, wherein the mayor or other officer has authority to inrol deeds.

5. A bargain and sale to K, Edward the 6th in Exchange, and acknowledged before a master in Chancery, and also before the chancellor of the augmentations, and delivered in the court and there put in a chest but not inrolled till several years after. It was held that such inrolment would not vest any interest in the Queen, Hill. 19 Eliz. D. 355. a, pl. 37.

on as is reported by Dyer; and that Pasch. 30 Eliz. in Scacc. this case of Dyer was denied to be law; and Manwood denied his opinion to be as reported there; for that after the acknowledgment of the deed, the delivery of it to be inrolled makes it a record. — But *ibid.* 35 Eliz. it was agreed by all the Justices in England, that such inrolment was good, and judgment given accordingly, in the case of Dean and Chapter of Windsor v. Middlemore. — And says, that the same was debated and agreed in the Parliament House; and that it was resolved by all the Justices, that the acknowledgment of the deed before the Master in Chancery, and the delivery of it into the Augmentation Court, does not make it a sufficient record before inrolment to vest the interest in the King, but when it is now inrolled with other date, it vests the interest in the King with relation. For all men are supposed to say, it is not inrolled according to the date, and cites to this purpose Pl. C. 491. in the case of Luttrell v. Gatten.

But see in margin *ibid.* where it is said, that the judges denied they gave any such opinion.

6. Inrolment *after livery* shall not have relation to the date of the deed, because now it takes effect by the livery which was before the inrolment. Arg. Goldsb. 18, Pasch. 28 Eliz. says it has been so adjudged.

If rent become due after the bargain and sale, and after notice of the bargain and sale to the

7. If a man makes a lease for life rendering rent, and then the lessor bargains and sells the reversion, and before the inrolment the *rent is behind*, and the bargainee demands the rent which was not paid and then the deed is inrolled, yet he cannot *enter for the forfeiture*. Ow. 69. Trin. 42 Eliz. Arg. said to have been so adjudged.

lessee, and the lessee *before inrolment pays the rent to the bargainor*, and then the deed is inrolled, it is a good payment, and the bargainor shall not account for it to the bargainee. Godb. 156. pl. 209. Mich. 6 Jac. B. R. Barker v. Finch.

8. S. was seised of certain lands in fee, and acknowledged a recognizance to T. whose executrix brought a scire facias upon the recognizance *bearing date the 9th of November, anno 41 Eliz.* against S. and alleged him to be seised of the said lands in dominico *suo ut de feodo* the day of the scire facias brought, which was traversed by the other party. And the truth of the case being by long pleading disclosed to the Court, was this; S. *on the 7th of November before the recognizance acknowledged, by deed indented for money had bargained and sold the said land to another, and the deed was inrolled 20 Novem. following.* The question was, whether S. was, upon the whole matter, seised in fee the 9th day of November, the deed not being inrolled till the 20th of the said month. And it was adjudged *una voce*, that S. was not seised in fee of the land the 9th of November, for that when the deed was inrolled, the bargainee was in judgment of law seised of that land from the delivery of the deed. And it was resolved, that neither the death of the bargainor, nor of the bargainee before inrolment, shall hinder the passing of the estate. 2 Inst. 674. cites Trin. 42 Eliz. C. B. Mallory v. Jennings.

9. A. bargainor, and B. bargainee, before inrolment they both grant a rent charge by deed to C. and after the indenture is inrolled; some have said, that this charge is avoided, for, say they, it was the grant of A. and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant notwithstanding the confirmation of the other, which had nothing in the land at that time. But the grant is good, and after the inrolment by the operation of the statute, it shall be the grant of B. and the confirmation of A. But if the deed had not been inrolled, it had been the grant of A. and the confirmation of B. And so quacunque via data the grant is good. Co. Litt. 147. b.

10. If a man for a valuable consideration by deed indented bargains and sells lands to another and his heirs, and before the deed be inrolled he *levies a fine, or makes a feoffment to bargainee and his heirs* of the same lands, and after, and within the six months the deed be inrolled, the bargainee shall be in by the fine or feoffment, and not by the bargain and sale, both by reason of this word (*only*,

(only, &c.) and that the estate by the common law vested shall be preferred. 2 Inst. 671. 672.

11. A release of a stranger to the bargainee before inrolment is good. So as it holds not by relation between the parties by fiction of law, but in point of estate, as well to them, as to strangers also. 2 Inst. 675.

If a disseisor bargain and sells land, and disseisor releases to bargainee before inrolment it is void. Arg. Roll. R. 425, says, it was so adjudged. Mich. 10 Eliz.

But a release to the disseisor before inrolment had been good, and then the inrolment should pass the estate to the bargainee, and he should take advantage of the release. Roll. Rep. 425. Mich. 34 Jac. in pl. 16.

12. A recovery suffered against the bargainee before inrolment, [420] (the deed indented being after, within the six months. inrolled) is good, for that the bargainee was tenant of the freehold in judgment of law at the time of the recovery. And non reset when the deed indented is acknowledged, so it be inrolled within the six months. And all this was afterwards affirmed for good law by the court of C. B. Trin. 3 Jac. Regis upon a special verdict given upon an ejectiōne firmæ between Lellingham v. Alfop. 2 Inst. 675.

13. Bargain and sale, the 1st of May and bargainee covenants to grant over all his land, which he had the 1st of May, and after the deed is inrolled he is not bound to grant this land, which he has by the bargain and sale. Roll. R. 425. Mich. 14 Jac. B. R. cites Sir John Cutt's case.

Ow. 69. Arg. S. C. cited as the case of Sir Richard Brockett, and Morgan's case.

14. A. bargained and sold land to B. by deed indented bearing date 11 June, 1 Jac. afterwards 12th June the same year common was granted to B. for all manner of cattle commonable upon the land; 15th June the deed of bargain and sale was inrolled; and it was adjudged a good grant of the common; and the inrolment shall have relation as to that, though for collateral things it shall not have relation. Godb. 270. pl. 377. Mich. 15 Jac. B. R. Ludlow v. Stacy.

Roll. R. 424. Gawth v. Stacy. S. C. adjournatur.

15. A lease for years made by bargainee before inrolment is void, and inrolment after shall not make it good. Cro. C. 110. pl. 2. Pasch. 4 Car. C. B. in case of Isham v. Morrice.

Hest. 82. S. C. & S. P. accordingly.

(P) Bargain and Sale. Pleadings, &c.

1. IN replevin the defendant shewed, that P. was seised, and granted the land by the words of dedi & concessi to A. and his heirs, pro certa pecuniæ summa, by indenture dated and inrolled in Chancery, 4 Nov. 29 H. 8. The plaintiff pleaded, that P. by indenture, 12 Oct. 30 H. 8. demised it to H. for 99 years, and that afterwards P. by indenture dated as above, viz. 4 Nov. 29. and primo deliberat' 1 Nov. 31 H. 8. didis & concessit, all the said lands, leased to H. to the said A. ut supra, and traversed, that

3 Le. 173. pl. 287. Holland v. Bonis. S. C. in totidem verbis; only that the word ("received") is there misprinted (re-verified.)—

Le. 189. *the said P. the said 29 Nov. 29 H. 8. adit & concessit, the said*
 pl. 257. *land to the said A.* Upon demurper the Court held clearly, that
 Holland v. the averment of primo deliberatum against a deed inrolled ought
 Franklin. not to be * received, for by the same reason it might be averred,
 Hill. 31 that nunquam deliberatum, and so upon the matter non est factum,
 Eliz. in 2 Le. 121. pl. 168. Mich. 29 Eliz. C. B. Holland v. Boia.
 B. R. the
 S. C. argu-
 e 1. —

Sav. 41. Holland v. Downe. S. C. the point was if against the time of inrolment of a deed in Chancery averment cannot be taken, that the deed was first delivered at a time after the inrolment, and adjudged against the defendant; and it seemed to the Court, that a stranger shall not be estopped by the inrolment, but the parties shall be bound by it; for though the inrolment is reputed to be of record, yet it is not a record created by any judicial act; for it is not like to a recognizance; and in all recognizances noli tuel record is a plea. The sealing and delivery is the force of such deeds, and not the inrolment; but in sales of recognizances, there they take their force and effect by the inrolment and the cognizance only, and not by the delivery; and therefore he may well enough be received to deny the time of the delivery, which is only a matter of fact; but the consuance before a Judge is matter of record, and thereby the debt is created. But obligations, indentures, and deeds of feoffment, take their force by the delivery, and consequently is a perfect act before the consuance is taken and before any inrolment, and so the bar to the avowry was adjudged good, and judgment was given for the plaintiff. — Ow. 138. Howard's case, S. C. says that in truth it was delivered, acknowledged, and inrolled afterwards, and that it was held that the bargainee [but seems to be misprinted for (lessee)] was without remedy at the common law; for he cannot plead that it was acknowledged or delivered after the date of the day acknowledging it, and that if such a plea should be admitted contrary to the record, it would shake most of the assurances in England.

[421] 2. If a man bargains and sells his land in fee, and by those words only, and *makes livery*, yet the bargainee may plead, that the indenture was *not inrolled*. For a bargain includes a grant. Per Curiam. Noy 66. Osmand and his wife.

3. If a man *pleads a bargain and sale, in which no consideration of money is expressed*, there it *must be averred, that it was for money*, and the words (for divers considerations,) shall not be intended for money without averment, but if the *deed expresses for a competent sum of money*, though the certainty of the sum be not expressed, it is good enough; for against this express mention in the deed, no averment, nor evidence shall be admitted; resolved per tot. Cur. clearly, and judgment accordingly. Mo. 569. pl. 777. Trin. 41 Eliz. Fisher v. Smith.

4. Albeit no *valuable consideration* be expressed in the indenture, yet if any were given, the same *may be averred*, and the land does sufficiently pass. 2 Inst. 672.

5. If a *deed be shewed in court, or in the custody of the Court, and by mischance the seal is broken off*, the Court shall inrol the deed in court for the avail of the party. 2 Inst. 676.

7 Mod. 77, 78. S. C. and the conviction was affirmed. 6. In declaration setting forth an indenture of bargain and sale inrolled, it is not enough to say that it was inrolled *juxta formam statuti*, but it must likewise *shew in what court*, that the Court may know whether it be duly inrolled, and that the party may know where to search for it. Cro. J. 291. pl. 9. Mich. 9 Jac. B. R. Warley v. Purley.

7. An inrolment was *pleaded to be made before T. a Justice of peace of the West Riding in Yorkshire*, and W. clerk of the peace there; it was held clearly, that though the *words of the statute are* (before the Justices of peace of the county) yet it will serve

before a Justice of peace of the West Riding, if the lands lie there, Hob. 128. pl. 163. Hill. 13 Jac. Perkin v. Perkin.

8. *A. leased for years, rendering rent half yearly, and afterwards bargained and sold the reversion by deed bearing date before the rent-day, but the rent-day incurred before the deed was inrolled; in debt for this rent the bargaineer declared upon this deed, and averred, that it was inrolled within the six months, according to the statute; exception was taken to the declaration, because the plaintiff did not shew whether the deed was inrolled before or after the rent-day; but the Court agreed that it is well enough it being pleaded to be according to the statute; and if it was not inrolled before the rent was due, that ought to be shewn by the defendant.* Lat. 157. Trin. 2 Car. Hall v. Dewe.

9. *In debt for rent the plaintiff declared on a lease for years made by stranger, who by a certain indenture debito modo irrotulat in Chancery, sold the reversion to the plaintiff; upon nil debet pleaded, the plaintiff had a verdict; but the judgment was arrested, because he did not set forth that the inrolment was within six months, nor secundum formam statuti; and though it was said (debito modo irrotulat) that would not help, because it might be so at common-law; and verdict could not make the declaration good for want of a convenient certainty for the foundation; and therefore on great deliberation adjudged against the plaintiff.* All. 19. Trin. 23 Car. B. R. King v. Somerland. 37y. 24. S.C. accordingly, and judgment afterwards against the plaintiff.—Rent-charge by bargain and sale was pleaded, but did not say, that it was secundum formam statuti, nor that there was any attornment. The Court held this naught, and that the laying *virtute ejus* he was seised, will not help it. Cart. 221. Pasch. 23 Car. 2. C. B. Anon.—The reporter says, quære if after a verdict; for the case there was upon demurrer. Ibid.

10. *A bargain and sale pleaded of rent, but without setting forth any consideration, is ill, but upon issue of non concessit, the want of setting it forth is cured by verdict; for it shall be intended to be proved on the trial; and judgment accordingly.* Lev. 308, 309. Hill. 22 & 23 Car. 2. B. R. Mannington v. Guillims. Vent. 108. Monnington v. Williams S. C. adjudged accordingly.
Raym. 209. Guilliams v. Mannington, S. C. mentions the deed as duly inrolled, but it being pleaded by way of bargain and sale, and that by virtue thereof and of the statute for transferring of uses into possession he was seised, and yet alleges no consideration, not so much as pro quadam pecunie summa, it is not good.

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11. *Where a man in pleading sets forth his title by a conveyance in which are the words give, grant, release, confirm, bargain, sell, &c. he must express to which of them he will use it; per Twisden.* Vent. 109. Hill. 22 & 23 Car. 2. B. R. in a note at the end of the case.

12. *10 Anna cap. 18. S. 3. Where in any declaration, avowry, bar, or other pleading whatsoever, an indenture of bargain and sale inrolled shall be pleaded, with a protest hic in Curia, the person so pleading it, may produce a copy of the inrolment of the bargain and sale; which being examined with the inrolment and signed with the proper officer, and proved on oath to be a true copy, shall be of the same effect, as if the original indenture of bargain and sale were produced.*

Provided

Provided that this act shall not give any benefit in pleading or deriving a title to any rent, which hath not been paid, or levied within twenty years next before the time of such pleading or deriving a title.

For more of Deeds in general, see *Feasts, Inclosure, and other proper Titles.*

Deer.

(A) How far protected.

1. **I**F deer are killed in an inclosure which is no park, the owner shall recover damages. *Kelw. 203. 21 H. 8.*

And if a deer go out of the King's forest into a man's

2. If a deer goes out of a park, though it be in the King's case, yet it is lawful for the owner of the soil to take it, if it be in the place where the deer hath chase and re-chase. *Per. Cur. Poph. 141, in the Earl of Northumberland's case.*

land, though the man ought, or used to pale against the forest, yet neither the forester, or any else can take them out, for now the King has no property in them, because they are wild beasts. *Per Brinn. Kelw. 6. Mich. 13 H. 7.*—Owner of land may hunt such *ferre deer*, and if the deer fly to the forest, and the hounds pursue them, he ought to call in his dogs, and so he may justify. *Per Dodderidge J. Poph. 162. Pasch. 3 Car. B. R.*

Deer-Stealing.

(A) Proceedings against Deer-Stealers, and Exceptions to Convictions.

1. **T**HE method of prosecution on 3 and 4 W. and M. 10. per Holt Ch. J. is thus, viz. The person convicted, if present, may be detained in custody two days, in which time the Justice ought, by warrants, &c. at his discretion to make what inquiry he can, so as to inform and satisfy himself whether the penalty may be levied by distress; and if he finds there is *nothing to distress*, then he must make a record thereof by way of *adjudication*, viz. *That it appearing to him that the party hath not any goods by which the penalty may be levied by distress, therefore in pursuance of that statute he doth award him to prison* (at the end of two days, but not before.) If the person is *absent* when convicted, then the Justice must make a warrant to distress; and if there is *nothing in which a distress* may be made, then after two days he must make a record thereof ut supra, and then issue out his warrant of commitment. Carth. 509. Hill. 11 W. 3. B. R. The King v. Chandler.

2. Information on the statute of deer-stealing. Exception was taken to a *witness*, because he was *party and prosecutor*. The exception was over-ruled. Comb. 35. Mich. 2 Jac. 2. B. R. The King v. Drake.

Court stuck a little, and Ld. Herbert declared it unreasonable that it should be so, but here was a particular law which made the offence, and creates a particular form of proceeding; and per Wythens, J. the two Justices of peace are sole judges of the credibility of the witnesses; and so all the Court delivered their opinions *seriatim & separatim*, that it was well enough; et sit per allocatur.

3. On a conviction of deer-stealing, exception was taken, 1st, That two Justices, upon a single oath, have *convicted* a man for *breaking and entering a park, and coursing a deer*, and imposing 20l. penalty for it; whereas there is no statute against breaking the park; and the offence by 13 Car. 2. cap. 10. is *coursing, &c.* and the penalty they have imposed is *pro offensa præd.* generally; but the exception was disallowed, and it was answered, that the offence was hunting the deer. 2 Show. 490, Mich. 2 Jac. 2. B. R. The King v. Drake.

4. 2dly, They have *not said*, that we did *course* without their consent, but only that we did *break the park* without their consent;

NOW

now we might break the park without their consent, and have their consent to hunting notwithstanding; those words *without consent*, can never go to the whole; for if it is not placed in the beginning, nor in the end, but only in the first clause, describing the manner how, just before the adverb *illicite*; then comes the other clause, & *unum damam illicite fugaverunt*; but this exception was disallowed; for the *absque consensu* shall go to the whole. 2 Show. 490. S. C.

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5. 3dly, That here are *several penalties for one coursing*; whereas the design of the statute, by the dividend of the penalty, seems to be only to give a satisfaction for the deer spoiled; but this exception was disallowed; for by the words of the statute, every several person forfeits 20l. 2-piece. 2 Show. 490. King v. Drake.

2 Show.

455-ph. 419.

Mich. 1

Jac. 2.

S. C. Ex-

ception was

also taken,

because the

indictment

concluded

contra for-

mam statu-

ti, and there-

fore naught,

because there was no statute against breaking the park, but only against chasing, hunting, and kill-

ing, &c. but the Court, without any answer to the exceptions, refused to quash it, and bid them to

plead or demur.

6. The defendant was indicted at a quarter-sessions, for breaking a park and taking away a deer *de bonis & catallis*, &c. 1st. Exception, Because one cannot have such a property of a deer in a park, as *de bonis & catallis*. 2d, It is *extitit presentatum*, for *existit*. 3d, That *the price is quadragint*. But it was answered by the Court. 1st, The offence is, killing the deer, &c. which is well laid, and *de bonis & catallis* is surplusage. 2dly, *Extitit*, or *existit*, is good both ways. 3dly, It is good without any price. Cites Co. Ent. 362. And the indictment was confirmed. Comb. 69. Mich. 3 Jac. 2. B. R. The King v. Foot.

7. Three were convicted of deer-stealing on the late act, one on his confession, and two on evidence, and the judgment saith, that all three were *convicti de separabilibus offensis by confession and testimony*, and held good *reddendo singula singulis*, but for another exception (*venatus in parculum*) the conviction was quashed, Comb. 233. Hill. 5 W. & M. in B. R. The King v. Mosely.

8. The defendant was *committed* (upon a conviction for deer-stealing) *for a year, and till such time as he should be set in the pillory*; whereas the act says, *for a year only*, and therefore he was discharged. Comb. 305. Mich. 6 W. and M. in B. R. Clark's case.

2 Mod. 321.

S. C. It was

inflicted that

an informa-

tion is no

prosecution

and so if the

party was

not prose-

cuted with-

in twelve

months af-

ter the of-

fence com-

mitted; but

it was an-

swered and

so ruled,

that the record sets forth, that the defendant *debito modo secundum formam statuti convictus fuit*,

9. Upon a conviction for deer-stealing; Northey took exception, that whereas by the statute the offender *ought to be prosecuted within twelve months*, which must be understood *lunar months*, here the offence was 14 Augusti 7 W. 3. the conviction 13 Augusti 8 W. 3. Indeed it is said, *Ipso R. debito modo prosecut' infra 12 menses post offens'*. The Court seemed to allow of the exception. Holt said, here is a special jurisdiction newly set up, and not known in law before, and therefore the act must be strictly pursued, and must appear to be so, they need not set forth every step of their proceedings, but so much that it may appear to be *debito modo* in respect of time, &c. for perhaps they might construe twelve months to be all one with a year. Comb. 439. Trin. 9 W. 3. B. R. The King v. Peckham.

that the record sets forth, that the defendant *debito modo secundum formam statuti convictus fuit*, which

which is well enough.—Carth. 406. S. C. and this difference was taken, to which the Court agreed, viz. Where time mentioned in any statute is expressed by the year, half year, or quarter of a year, it is always computed in law by solar months, (viz.) twelve calendar months for a year; but where months are mentioned in a statute, and not years, those are always computed by the moon, (viz.) four weeks to the month; therefore this statute appointing the prosecution to be within twelve months after the fact; and twelve lunar months being expired before any prosecution, for that reason the conviction was quashed.

10. On a warrant directed to all constables, it is the same as if directed to each particular constable, and *every one is bound to execute it in his particular jurisdiction*; but if one constable returns, that he has *no distress in the county at large*, it is ill. 12 Mod. 314. Mich. 11 W. 3. King v. Chaloner.

11. F. was convicted in a summary way on the statute of deer-stealing; to which it was objected, 1st, That it did *not appear* on the record that the defendant had any notice to come and make his defence, et citatio est de jure naturali, that none be convicted without an * opportunity of making defence; quod Cur' concessit. But this being by persons by law intrusted with the administration of justice, we will intend they have proceeded regularly and legally, if the contrary appear not. 2dly, Not shewed to be the offence described by the statute; for it is *not said that deer were usually kept there for ten years before*. Per Cur. If that be *notoriously known*, it need not be averred. 3dly, It is said, we killed the deer *without the consent of the owner on such a day*; so they tie up the want of consent to the day, and that is ill, for the consent might have been given the day before to kill the deer the next day, and then it would be a lawful killing, though in strictness without the owner's consent on that day. But per Cur. a consent to day to kill a deer any day for a month is a consent for every day till it be executed or revoked, which cannot be till notice. Lastly, It was *moved to stay the affirming the conviction, because there was an information for perjury against the witness on whose oath it was, till that were tried*. But nevertheless it was confirmed. 12 Mod. 453. Pasch. 13 W. 3. The King v. Ford.

sld. Raym. Rep. 768. S. C. but same points do not appear.

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12. Exceptions to a conviction of deer-stealing, where the *fact was laid to be done in foresta usitata for keeping deer, and that the defendant killed a deer without consent of the keeper*; and insisted that *usitat.* might be meant of a long time before, and there might be the consent of the ranger; sed non allocatur, for the leave of the ranger is the leave of the keeper, and (*used*) speaks the present time, as well as time past. 1 Salk. 377. pl. 22. Mich. 1 Ann. B. R. The Queen v. Smith.

7 Mod. 77, 78. S. C. and the conviction was affirmed.

13. In a conviction of deer-stealing, it was agreed. 1st, That the fact in the conviction need not be laid *contra pacem*; for mere form, or form or formality is not required in these nor any other summary proceedings, et per Northey Attorney General, *This is not the King's prosecution*, (he can have no fine) but the prosecution of the party, and this is the memorandum of what the justice had done in that matter. 1 Salk. 378. pl. 23. Mich. 1 Ann. B. R. The Queen v. Chandler.

14. It being said, *That inter such a day and such a day he killed three deer* is good; for if a day certain were alleged, the informer is

is

is not tied up to that; now in these cases he is confined to give evidence of a killing within these days, so that it is more certain and better for the defendant. 1 Salk. 378. in S. C.

15. Thirdly, That an unlawful killing is sufficient, and it need not set forth a hunting, nor how the deer was killed. 1 Salk. 378. in S. C.

16. Fourthly, That *ideo consideratum est quod convictus est* without *et quod forisfacit*, is sufficient; for the statute gives that in consequence, and the judicial part ends at the conviction; the rest is only consequence and execution. 1 Salk. 378. in S. C.

[This in the parenthesis seems to be a note of the reporter.

17. Fifthly, That if the owner of the park dies before execution, and the conviction is affirmed here; his executors shall have a *levari facias* (¶ sed videtur, it must be upon affidavit, and then the matter suggested on the Roll) so may the churchwardens without suggestion or *scire facias*, and so may the King. 1 Salk. 378. in S. C.

18. A conviction against the defendant for killing deer was removed into this Court by certiorari, and was quashed, because it was said only, that he killed deer in quodam loco, where they had been usually kept, and did not say inclosed. 2 Ld. Raym. Rep.

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A conviction on which said, that Jennings had skins in his custody, without saying, that the skins were found in his house, is not sufficient, but was quashed; for this conviction must be taken strictly. MS. Rep. Trin. 7 Ann. Jennings's case.

791. Trin. 1 Ann. B. R. The Queen v. Moore.

19. It was moved to quash a conviction of deer-stealing on 3 & 4 W. & M. taken by a justice who entered into a glover's house, and finding a deer-skin, asked him how he came by it? the glover said, he bought it of J. S. who not giving a good account of himself was convicted. * And the Court held, that the justice might enter and convict the person that sold it; for the statute might be easily evaded, if the deer-stealer could discharge himself by a sale. 1 Salk. 383. pl. 33. Trin. 7 Ann. B. R. The Queen v. Jennings.

20. Upon the statute of 3 & 4 W. & M. the question was, whether Justices of Peace might convict the offender in his absence, upon his default to appear after having been duly summoned; and after several arguments in several terms, the Court held that they might, and the conviction adjudged good. 10 Mod. 240. Trin. 13 Ann. and 341. Mich. 3. Geo. and ibid. 370. Hill. 3 Geo. B. R. The Queen v. Simpson.

21. An information granted against two justices for convicting a person of deer-stealing, because he had in his custody *seven* buck-skins dressed into leather, and made a third person give bond for payment of the forfeiture; for buck-skins dressed into leather are not within the statute any more than a man's having a pair of buff breeches. They must be fresh raw skins. Patch. 2 Geo. B. R. The King v. Sadler.

22. Conviction upon deer-stealing quashed, because it did not appear when the deer was killed, and the prosecution must be within a year. MS. Cases P. 2 Geo. B. R. The King v. Dell.

23. The defendant was convicted upon the 3. and 4. W. and M. cap. 10. for killing deer in the Bishop of Winchester's Park; exception

Exception was taken to the conviction, 1st, Because it *set forth* that *J. S. took an oath to say the truth concerning the premises & sic jurat' existen' dicit deponit & jurat*, without saying, *supra sacrament' suum prædictum*, which it was said was necessary to make what he swore, to appear to be sworn in pursuance of the oath, which he took to declare the truth upon the premises, for it might be, that what he did depose was in pursuance of an oath extrajudicially administered, and so the uncertainty would prevent his being convicted of perjury if his oath was false, but disallowed per tot. Cur. and it was held, that the words in the conviction did sufficiently shew, that what he deposed was in pursuance of the oath aforementioned, and as certain as the entry of all verdicts. 2dly, Because it *said*, that *the defendant post summonitionem ei debito modo fact' appeared*, but did not *set forth* the day of the summons, nor that it was to answer to that information, both which it was said were necessary; the first that the Court might judge, whether the defendant had a reasonable time to prepare for his defence; the second, that the defendant might know what to answer unto; but the Court overruled the exception, and held, that *debito modo summonit'* was sufficient, and that it was the common form, and that in this case, there was no need to mention any summons, because the defendant appeared, and that it had been often so adjudged, and that his appearance and defence made the other part of the exception wholly groundless. 3dly, Because it *said*, that *causa information' præd. & information' præd. & evidentiæ per præd. J. S. (who was the witness) audit' & plene intellect'*, whereby it appeared, that the cause of the information, &c. was heard and understood by the witness, but did not appear that it was heard, &c. by the defendant; but the Court disallowed this exception, and held, that per præd. J. S. referred to *evident'* and not to *audit'* &c. and that *audit'* & *intellect'* extended to every one that was present and concerned, and that the subsequent words, viz. that the defendant was spoke to by the justice, if he had any thing to say why he should not be convicted of the premises, shewed that he was sufficiently acquainted with the matter. N. B. Eyre said, that it would have been better, if instead of per præd. J. S. it had been per præd. the defendant *audit'* &c. MS. Rep. Trin. 4 Geo. B. R. The King v. Coldham.

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24. The defendants were severally convicted of deer-stealing, upon the 3 & 4 W. 3. cap. 10. Two exceptions were taken to both the convictions; 1st, Because *the person, upon whose testimony the defendants were convicted, appeared to be of the same parish where the facts were committed, and so might be entitled to part of the penalty*, and consequently not indifferent and credible witnesses. The second, because *the judgment was only, that the defendants should pay 30l. whereas it ought to have been for 30l. or imprisonment, &c.* but both were over-ruled per tot. Cur. the first, because the Justice of Peace hath averred them to be credible witnesses, and it doth not appear that they were of the poor of the parish. The second, because the judgment for 30l. is to be first given, and

Deer-Stealing.

and that this exception had been before over-ruled. MS. Rep. Mich. 5 Geo. B. R. The King v. Wilford and Savage.

25. Record of conviction for deer-stealing, was entered without any judgment, as *ideo forisfaciat*, and therefore quashed. Gibb. 124. pl. 9. Hill. 3 Geo. 2. B. R. The King v. Hawkes.

(B) Execution. How.

And if the
sheriff re-
turn nulla
bona, then
a capias
against the body.

1. **O**N a conviction for deer-stealing, the execution shall be by *fi. fa.* Carth. 231. Pasch. 4 W. and M. in B. R. The King v. Rogers.

See 13 Car. 2. cap. 10. Ibid.

2. It was agreed per totam Curiam, that deer-stealer was not to be imprisoned, but upon failure of payment and distress. 12 Mod. 315. in case of King v. Chaloner.

3. If all the sum were levied to a small matter, yet the party for default thereof shall undergo the corporal punishment too, viz. the pillory, and a year's imprisonment; per tot. Cur. 12 Mod. 330. Mich. 11 W. 3. in case of the King v. Speed.

4. F. and the other defendants were convicted of deer-stealing by Justices of Peace, according to the late act of parliament; and the convictions, being removed into B. R. by certiorari, were there confirmed. And after the confirmation, and before execution awarded, the person, who was as well the informer as the owner of the deer, died; and his wife being his administratrix, suggested his death upon the Roll, and that she was administratrix, and upon that sued a *levari facias* upon the said convictions, confirmed as aforesaid, to levy the penalties; which were levied accordingly by the sheriff, and distributed as the statute directs. It was moved, that this execution should be set aside as irregularly obtained, 1st, Because a *levari facias* does not lie. 2dly, Because the execution ought not to have been sued by the administratrix without a *scire facias*, &c. But as to the first objection, the whole Court held, that a *levari facias* well lay. But they held, that this execution was irregular; because in no case where the parties to the judgment are changed ought execution to be sued by any other without a *scire facias*. Whereupon restitution was granted of the money levied. 2 Lord Raym. Rep. 768. Pasch. 1 Ann. B. R. The Queen v. Ford, & al'.

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1st d. Raym.
Rep. 989.
S. C. and
no manda-
mus lies.

5. The defendant was convicted of deer-stealing, and a warrant was awarded to the constable to levy, &c. He accordingly distrained, and then came a certiorari to remove the conviction; and after the record removed, the constable sold the goods, but would not part with the money, or return the warrant. And the Court held, 1st, That the constable might well proceed in the execution after the certiorari, because it was begun before, and the certiorari no more stays it than a writ of error of a judgment in C. B. stays the executing of a *fieri facias* already begun to be executed. And in that

that case, if the sheriff returns want of buyers, C. B. may award a venditioni exponas, notwithstanding the writ of error pending. 2dly, That this Court had no power over the warrant, being granted before the certiorari issued, and therefore they refused to make a rule upon the constable to return it; comparing it to the case of a writ of execution delivered, &c. before a writ of error. But they said, the justices might fine him, if he would not return his warrant, or deliver over the money to the prosecutor. 1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. The Queen v. Nash.

6. One was convicted for deer-stealing, and a warrant was directed to the defendant to levy the forfeiture by distress, by virtue whereof he distrained cattle, and sold them, but before he paid the money to the prosecutor, he was informed it was dangerous for him to sell the cattle; whereupon he restored the money and the cattle, and now the prosecutor moved for a mandamus, to compel him to pay the money to him; but it was denied, though insisted for him, that he could not charge the defendant in an action, without giving the warrant in evidence, which he could not do, because it was in the custody of the defendant. It was held, that a copy of the warrant was good evidence. 6 Mod. 83. Mich. 2 Ann. B. R. Morley v. Staker.

7. If the constable levies the penalty, but does not return the warrant, he is indictable. 11 Mod. 53. pl. 30. Pasch. 4 Ann. B. R. The Queen v. Wiatt.

sLd. Raym. Rep. 1189. S. C. and Holt, Ch. J. held, that it

was not necessary to set forth the conviction in the indictment at large, but only shortly, viz. that such an one was before such and such Justices convicted secundum formam statuti, & superinde, a warrant was issued, &c.

8. If a man is under three convictions, and his goods are sufficient to answer two of them, the money shall be paid, and he shall stand in the pillory for the third; per Holt Ch. J. 11 Mod. 54. Pasch. 4 Ann. B. R. in case of the Queen v. Wiatt.

sLd. Raym. Rep. 1195, 1196. S. C. & S. P. Per Cur.

9. But on one conviction, if he wants but 2s. in the whole, the justices cannot take it, but he must be imprisoned, and stand in the pillory for it afterwards; per Holt Ch. J. in the S. C.

sLd. Raym. Rep. 1196. S. C. & S. P. Per Cur.

(C) Aiders and Abettors. Who are.

1. UPON a conviction of deer-stealing by Justices of Peace on the late statute, the question was, whether one not present, but procuring, advising, and abetting, by lending his gun, dog, &c. before the fact, should be said to be aiding and abetting therein; Holt Ch. J. inclined, 1st, That he was not within the words, not being actually present at the fact, because the statute is to be construed strictly, for that it takes away the privilege of a better trial, viz. per pares. 2dly, Because it adds a farther penalty to what was an offence before; he said, there might be an aiding and abetting before the fact, viz. by advice, &c. or in the fact, by being present;

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Deer-Stealing.

present; or *after the fact*, by *abetting the party*, says, See Dy. 184. Co. Ent. 56. The other Judges held, that aiders in the fact would be principals, and then aiders and abettors would mean nothing, quod Holt negavit, saying, all that are present may be said to be principals as to an action of trespass, but not as to the penalty of this statute; and this diversity is apparent in other cases; for one aiding and assisting upon the statute of stabbing, shall have his clergy; whereas a principal shall not; so in the case where two went to break a house, one broke it and entered, the other stood upon the ladder and received the goods; he that stood upon the ladder shall have his clergy, and the other shall not, he being a principal. 2 Salk. 542. pl. 1. Mich. 1 Ann. B. R. The Queen v. Nash.

7 Mod. 129. 2. Rolfe and others were convicted of deer-stealing upon 3 and 4 W. and M. cap. 10. and that Whistler was *illicite & injuste auxilians & assistens* præfato Rolfe, &c. *in illicita & injusta venatione & occasione damæ præd. viz. persuadendo & incitando præfat. Rolfe to kill the same deer, and lending dogs to hunt and kill, and horses to carry away the said deer, contra formam statuti*; and whether this was an aiding and assisting within the statute, was the question. Powell, Powys, and Gould, Justices, held that it was; but Holt Ch. J. contra held, that the conviction ought to be quashed, for that where a statute makes that felony, which was not so at common law, aiders and abettors, according to the notion of the common law, are within the statute, though not expressed; but where an offence at common law is only made more penal, aiders and abettors are not to be understood of such as aid before and after the fact, but such as are present only; these were only accessaries at common law, and are not within the act; and cites 1 Cro. 478. Dal. 11. 22. Postea in the same case, Holt Ch. J. said, he held the same diversity with this farther, that this is to be understood when an offence at common law is made more penal by a particular description of the fact, and not under a general denomination of the crime; as if this statute had enacted these penalties on them, as trespassers, as 'tis done by the statute de malefactoribus in parcis. 2 Salk. 542. pl. 2. Hill. 1 Ann. B. R. The Queen v. Whistler.

11 Mod. 25. pl. 3. S. C. argued by the Court, and adjudged by three Judges contra Holt, Ch. J. that the defendant was guilty, within the statute.—1 Ld. Raym. Rep. 842. S. C. with the arguments of the Judges, and the conviction was confirmed by the opinion of three Justices, against the opinion of Holt, Ch. J.

For more of Deer-Stealing in general, See the several Statutes relating thereto.

Default. Appearance.

(A) Appearance. What shall be said an Appearance.

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- { 1. IF the tenant or *defendant* be in Court, yet if he says that he *will not appear*, this is not any appearance. † 8 H. 6. 7. b. 8. § 7 H. 6. 38. b. 8 H. 6. 8. adjudged.

fault, pl. a. cites S. C.—Br. Default, pl. 36. cites S. C. § *Fremdon* by J. S. against H. C. who were at issue, and H. C. was prisoner in B. R. and the demandant prayed at the day of the jury, that he might be brought in, that he might not take the advantage of the imprisonment, because he did not appear, and it was granted him, and he was brought in by the Marshal in ward, and was demanded, and would not appear, and was brought to the bar, and *Habb.* demanded of him if he would appear, who said no; Babb said, then you shall not have advantage to avoid your default, and *petit cupe* was awarded, and the demandant prayed, that all be entered, and so it was, and prayed upon his presence, that the inquest be taken, which was denied; for his presence is no appearance, and by his non appearance, he shall be intended another person; and after he was sent back to prison. Br. Default, pl. 33. cites 7 H. 6. 38.—Br. Saver Default, pl. 21. cites S. C. and 8 H. 6. 16. and that the Court sent him back, and recorded his presence, but not his appearance; but if he had been prisoner to the same Court, his appearance had been recorded; for if the presence of the prisoner is always of record in that Court to which he is prisoner, contra if in another Court; but says, it seems reasonable, that if he takes advantage of the imprisonment, the other shall shew, that he was present at the bar, and might have appeared, and would not. And *Ibid.* cites the opinion of Martin, in *Affise* 8 H. 6. 8. at the end, that by this special entry made for the prisoner, that he was present, and might have appeared, and would not, that he shall not excuse his default after by imprisonment.—Fitzh. Default, pl. 1. cites S. C.

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- { 2. As in an *affise*, the tenant makes default, and one appears for him as his bailiff, and the tenant comes and disavows him as his bailiff, this is not any appearance; for he does not come to appear, but to disavow the bailiff. 8 H. 6. 7. b. adjudged.]

- { 3. If a man brings an *action* against an * officer of a Court, he ought of necessity to answer, otherwise he shall be condemned; for he is always in Court. 8 H. 6. 16.]

- { 4. So of a Sheriff upon his account. 8 H. 6. 16.]

- { 5. So if an *action* be brought against a man that is a prisoner in the same Court, he cannot but appear, or shall be condemned. 8 H. 6. 16.]

record, and upon bill brought against any of them, he ought without force to answer, or he shall be condemned, but a man at large may choose to appear, or to make a default; but in this case the defendant had election; for he was not a prisoner in this Court, but to another Court, quod nota, a very good difference. And so it seems here, that the defendant may avoid the default at the *petit cupe*, by his imprisonment. Br. Default, pl. 33. cites 7 H. 6. 38. and 8 H. 6. 16.—Br. Saver Default, pl. 21. cites S. C.

* *Sid.* 234, 236. pl. 8. *Falsch.* 15 Car. 2. B. R. The King v. Paget, J. P. and that he shall not appear by attorney, nor shall any process issue against him, but that upon reading the information

as the case there was] against him, the Court will give judgment against him; and Twifden, J. cited the book of 7 H. 6. 38. b. where such proceedings seem to be against an attorney of C. B. — Keb. 487. pl. 27. S. C.

[6. But it is *otherwise* of him that is a prisoner in another Court. 8 H. 6. 16.]

[7. If a man comes in by *cepi corpus* to two writs, and to three other writs he hath day by distress, he ought to answer to those to which he comes in by *cepi*. 12 H. 6. 2.]

[8. So he ought also to answer to those in which he hath day by distress, for he is in ward by the return of *cepi corpus*. 12 H. 6. 2.]

[9. But if upon the *capias* the sheriff had returned *non est inventus*, and he had come in *gratis*, he might have answered to the writ out of which the *capias* issued, and not have answered to the rest. 16 H. 6. 2.]

Hob. 179. pl. 209. S. C. [10. In an action of debt against baron and feme for the recovery of the feme, the baron cannot appear by superedeas only; for either both ought to appear, or both be outlawed. Hobert's Reports, 24. Loveden's case, resolved per Curiam.]

Sty. 226. Elfy v. Mawdit. S. C. adjudged, that the plaintiff nil capiat, per Billam, because his declaration is not good against her in custodia. [11. If an action be brought against an attorney de B. R. and his wife, and he declares against the baron, being an attorney of the court, in proper person, and against the feme in custodia mareschalli, upon bail filed for the feme only, this is not good; because bail cannot be filed only for the feme, without bail for the husband, and the baron cannot have his privilege in this case when the action is brought against him and his wife. Trin. 1650. between *Morthwaite and Elfy, adjudged, this being moved in arrest of judgment. Mich. 23 Car. B. adjudged accordingly for an attorney in bank, between Smith and Smith.]

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12. In Mortdancester in Middlesex the tenant was *essoigned* and after made default by which Bacon awarded a *resummons* against the tenant where the demandant intended to have the assise by default, which the tenant made after the *essoign*; but nota, that *essoign* is not any appearance, and so nota bene. Br. Mortdancester, pl. 18. cites 8 Aff. 13.

13. In assise the lord of D. demanded *consuance*, and the tenant said, that it is out of his franchise, and so to issue; and when the assise came ready to pass upon this issue, the tenant was demanded and appeared by bailiff, and no appearance by award; for it is against a stranger to the assise; for he may appear and plead against the plaintiff in the assise by bailiff, but not against a stranger as here, and so a good appearance against the plaintiff, and default against the lord, quod nota. Br. Default, pl. 102. cites 28 Aff. 13.

14. In *præcipe quod reddat*, the tenant as to parcel pleaded *non-tenure* and so to issue, &c. and to the rest vouched, and process sued till the sequatur, which was not returned; and as to the parcel the tenant cast *essoign*. Thirn. said, the *essoign* does not lie; for he ought to appear upon the issue; for the distress is returned against the jury, and he cannot appear and be *essoigned* all at one and the same day upon one entire original, which is not by several *præcipes*, by which he made default. Br. Default, pl. 100. cites 11 H. 4. 8.

15. A

15. A man cannot appear as tenant and make default as tenant all at one and the same day; but he may appear as tenant and make default as vouchee all at one and the same day, as it is said elsewhere; for he mayessoign as vouchee. Br. Default, pl. 83. cites 11 H. 4. 82.

16. When *essoign* is cast for the tenant by one roll, and appearance entered in another roll at the same day, the appearance shall defeat the *essoign*, quod nota. Br. Default, pl. 43, cites 4 H. 6. 6.

17. A man may appear and be by protection all at one and the same day in diverse respects, quod nota bene. Br. Default, pl. 40. cites 21 H. 6. Br. Protection, 5a. cites 21 H. 6. 41. Sa C.

18. In action personal if the defendant does not appear at the return of the original the entry of the filizer is, et quod querens obtulit se 4to die against the defendant, et ipse non venit ideo capiatur, &c. and so at the alias cape, and other process, and yet by the best opinion this is no appearance of the plaintiff to conclude him to deny but that this is his suit. Br. Default, pl. 50. cites 27 H. 6. 23.

19. When the defendant in action personal makes default at the original by which it is entered, quod querens obtulit se 4to die against the defendant, and has capias, and so at the second appearance, this is not properly an appearance of the plaintiff to the suit, and then without appearance it cannot be said his suit. Br. Estoppel, pl. 105. cites 37 H. 6. 22, 23.

20. The abbot of C. brought assise against J. S. and had nisi prius against him the same day in action personal, and the defendant appeared in person to the assise and cast protection quia moratur to the nisi prius, and did not appear to it and yet good; for in diverse actions a man may be nonsuited and may appear all at one and the same day. Br. Default, pl. 66. cites 5 E. 4. 3.

21. Where upon any process the defendant does appear, although the day of appearance be not lawful, yet he shall be put to answer. 2 Le. 4. in Savacre's case, cites 9 E. 4. 18. where there are many cases to the same purpose.

22. The abbot of St. A. entered into account in the Exchequer by bailiff, and pending the account L. brought bill of debt of 20l. against him upon obligation, and prayed that he should answer. Catesby said, he has not yet appeared; Ursewick Ch. B. said, he has appeared by bailiff, which is his own appearance, and during his account he ought to answer. Quod nota. Br. Bille, pl. 12. cites 15 E. 4. 28. [432]

23. In debt the appearance of the defendant was recorded for all the term, except pro juratoribus; Brooke says, it seems that this shall not serve in another action purchased by another. Br. Default, pl. 103. cites 21 E. 4. 37.

24. A. is bound in a recognizance to appear in C. B. at such a day, and A. is there that day; it was moved, that though his appearance be not recorded, yet he shall have averment, and it shall be tried per pais, but this was denied by Bryknell, and Canningby J. but it was said, that if A. will aver, that he himself was imprisoned, he shall have a writ directed to the gaoler to

He ought to plead prout patet de recordo; for though he appears, yet if his appearance be not entered

of record, know the truth thereof. *Keilw.* 180. pl. 1. *Trin.* 8 H. 8, B. R. he forfeits Anon. his obligation.

tion, and he ought to conclude so, otherwise the plaintiff cannot have an answer thereto, to say, nul tiel record; and of that opinion was all the Court. *Cro. E.* 466. pl. 16. *Hill.* 38 Eliz. B. R. *Corber v. Cook.*—*Le.* 90. pl. 114. *Mich.* 29 & 30 Eliz. C. B. *Brett v. Shepherd*, per *Anderson, Ch. J.* if A. is bound to appear in B. R. such a day, and A. goes at the day to the same court, but no process is returned, he may pray one of the chief clerks of the court to take a note of his appearance; and the prothonotary said, that they have such a certain form of entry of such appearance in such cases; and the same law is, where at the day of appearance no court is holden, or the Justices do not come &c. he ought to have an appearance recorded, and if the other party pleads nul tiel record, the defendant must have the record ready at his peril; for C. B. in which this action was brought, cannot write to the Justices of B. R. to certify a record hither. But per *Dyer*, in debt or trespass against baron and feme, and at the capias the baron appeared gratis, he shall have idem dies, and the process shall issue against the feme; but where the baron appears at the day of the exigent returned, and the feme is returned waived, the baron shall go sine die, and capias ulagatum shall issue against the wife; quod *Leonard* concessit. *Dal.* 38. pl. 7. anno 4 Eliz.

Le. 138.

139. pl. 189.

S. C. The

Prothono-

taries said,

that the

court should

have given

the

defendant

notice, but

the Court,

who

thought it a

dangerous

practice, at last

advised thereof,

and ordered the

superfedeas to be

stayed, without

recording

the husband's

appearance. And

Antrobus, one of

the attornies of

the court, said,

that it was

the case of the

Lady Malory

and her husband,

in which the

husband brought

superfedeas, and

it

was not

allowed, but

process continued

until outlawry.

25. *Debt against husband and wife executrix* of her former husband, the husband appeared upon the exigent, and would have put in a superfedeas for himself alone, without appearance for the wife, which at first the Justices thought he might, but upon a precedent shewed, 18 Eliz. in one *SOMMER'S CASE*, who would have put in such superfedeas for himself alone, but was not suffered so to do, but was compelled to put in appearance, attorney and superfedeas for his wife also; whereupon all the Justices held now accordingly; otherwise an exigent de novo shall issue out against him. *Cro. E.* 118. pl. 4. *Mich.* 30 & 31 Eliz. B. R. *Bilford v. Fox.*

practice, at last advised thereof, and ordered the superfedeas to be stayed, without recording the husband's appearance. And *Antrobus*, one of the attornies of the court, said, that it was the case of the *Lady Malory* and her husband, in which the husband brought superfedeas, and it was not allowed, but process continued until outlawry.

26. *W. A. prisoner in the Fleet, was brought to C. B. bar by habeas corpus*, to the intent to have him appear to an original in debt brought against him; and being demanded by *Goldesburgh Clark*, whether he were the same party against whom the original was brought, confessed it, but *denied to appear to the action*; the whole Court said, this was no appearance, whereby he was remanded to the Fleet; and the plaintiff proceeded to the outlawry against him. *Goldsb.* 118. *Hill.* 43 Eliz. *Ascoug's case.*

27. Condition for appearance is not saved by removing the recognizance by certiorari. *Yelv.* 207. *Trin.* 9 Jac. B. R. *Rofs v. Pie.*

28. In an action of debt upon a bond, being entered into to the sheriff, for the appearance of another here in court, at a day certain, at which day the party did not appear, but two days after he did appear; whereupon it being moved for the party to have this appearance now allowed of, and so to have a discharge of his bond, the Court held clearly, that this appearance, though after the day, is to be allowed for a good appearance, and to be a sufficient discharge of the bond, for that the whole term is but as one day in law; and so was allowed of by the Court, and the appearance was

was recorded, and the bond discharged. 2 Bulst. 255. Mich. 12 Jac. Daly v. Fryar,

29. Appearance in *the King's Bench*, is, the defendant's *filing* either of *common bail* or *special bail*, if the *action* be by *bill*; but if it be by *original*, then the appearance must be with the *philazer* of the county where the arrest was. But if the appearance be in the *Common Pleas*, then it must be entered with the *philazer* there; but if it be by *bill* (which in some few cases it is) it must then be entered with the *prothonotary*. L. P. R. 83.

30. There can be no appearance in B. R. but either by *special* or *common bail*; for it is the putting in of bail, that attaches the cause in court. 7 May, 1650. B. S. L. P. R. 84.

31. Giving bail to appear shall be taken as an appearance, so that in such case, judgment being entered by *nilil dicit*, instead of *defaultam fecit*, is erroneous. Per Twisden, J. Sid. 32. Hill. 12 & 13 Car. 2. B. R. Burgefs v. Pierce.

Filing common bail, is an appearance upon record. L. P. R. 85.

32. It is a general rule that where a defendant appears *voluntarily* it shall be of no force, unless the plaintiff sues out his *latitat*, or bill of Middlesex, and within a fortnight. Cumb. 244. Pasch. 6 W. & M. in B. R. Anon.

33. The *filing* a writ of *habeas corpus* is not an appearance, but a *procedendo* may go notwithstanding; but if bail, either common or special, be put in, then no *procedendo* to go. Per Holt Ch. J. 12 Mod. 215. Mich. 10 W. 3. B. R. Anon.

34. An appearance to an indictment differs from appearance in a *civil action*, where if there is once an appearance, it is an appearance to the end of the suit; but an appearance to an indictment, is of course but of that term, and then if it be not prosecuted, then the defendant is out of court the next term, and may be outlawed, and the outlawry is a conviction while it stands unreversed. 12 Mod. 448. Pasch. 13 W. 3. B. R. The King v. Foster.

35. If before a writ be taken out, an attorney promises to appear to it, and after it is taken out and shewed to him he ought to appear, but it is no actual appearance, but if such undertaking be after writ taken out it is an appearance. Per Holt Ch. J. 6. Mod. 42. Mich. 2 Ann. B. R. Anon.

36. The defendant, being a *Justice of peace*, was found guilty upon an information for maliciously convicting and imprisoning the prosecutor for selling ale without a license, without ever summoning him, or admitting him to make any defence; and it was moved that till the Court should give judgment upon him, his personal appearance might be dispensed with, on a clerk in court undertaking to appear for him, and this was insisted upon as a motion of course, which was never denied in any case, where the punishment will probably be only pecuniary, and not corporal. But this was opposed, unless the defendant would make an affidavit of sickness, or other reasonable excuse; the Court were clearly of the same opinion, and said it was by no means a motion of course, but merely of favour and discretionary; that the Court has a right to demand his appearance, and whatever the punishment may happen to be, his public and personal attendance in court is part

Default. Appearance.

of it; it was moved again at another day, but *denied* very strongly by the whole Court. Afterwards the defendant appeared in person, and was fined 300l. Pasch. 11 Geo. 2. B. R. *The King v. Harwood.*

* (A. 2) Where, upon coming into Court for another Purpose, one shall be obliged to Answer in the Cause in Court.

1. **H**E who came by *capias utlagatum*, was compelled to answer to another's exigent, which was at another suit, at the prayer of the plaintiff in the other suit. Br. Responder, pl. 61. cites 38 E. 3. 25.

2. One was prayee in aid as a man who was within age, and was made to come to be viewed, and was adjudged of full age, and was not awarded to answer, but process was made against him to answer, because he did not come to answer, but to be viewed; and contra in the time of R. 2. and that he who is within age, and prayee in aid, and awarded of full age, shall answer presently. Br. Responder, pl. 8. cites 2 H. 4. 6.

3. *Contra of voucher*, for he has no day in court to answer, and concord' of the vouchee 14 H. 6. For the vouchee ought to be viewed in court, and all the answer lies in the mouth of the tenant, against whom, &c. as appears 31 E. 3. and P. 21. E. 3. in Cui in vita. Ibid.

S. P. Per Vamp. Br. Process, pl. 88. cites 14 H. 6. 19. 20. —S. P. Br. Responder. pl. 27. cites 14 H. 6. For he comes for other purpose. —So infant who comes in praepos quod reddat to be viewed, shall not be compelled to answer to the action or voucher. Br. Responder, pl. 58. cites 45 E. 3.

Fol. 381.

(B) *What shall be said, an Appearance.
In Custodia Marefchalli.*

Cro. E. 605. [1. **T**HERE shall never be a declaration against a man in
pl. 1. S. C. custodia marefchalli, but where there is a committitur
held accordingly. made of the party, or bail put in for him. Pas. 40 El. B. R. in
—Roll. Holland's case, by Popham.]
Rep. 217.
pl. 18. Trin. 13 Jac. S. P.

Cro. E. 605. [2. Upon an appeal, if the sheriff returns *capi corpus*, the plain-
pl. 1. S. C. tiff cannot declare against the defendant in custodia marefchalli,
without declaring against him upon the original, upon which the
capi corpus is returned; for there is no reason to commit the de-
fendant to prison, when he is ready to answer the writ upon which
he was taken. Pasch. 40 El. B. R. Holland's case adjudged.]

3. A declaration was delivered to one in custodia marefchalli, who immediately removed himself to the Fleet. All the Justices held, that the party may proceed against him upon the declaration; and after judgment seemed that he may remove into B. R. again
by

by habeas corpus. Sid. 100. pl. 3. Hill. 14 and 15 Car. 2. B. R. a nota.

* (B. 2.) Notice of Appearance. How. Good.

1. A QUESTION arose upon the late act of parliament, touching notice to be given upon the copy of process, whether the day to be expressed in the notice must be the *essoïn-day*, or the *appearance-day*? In this case notice was given for the appearance-day, which the Court held to be good. This motion was after judgment; but the merits not having been tried, a rule was made to shew cause why the judgment should not be set aside upon payment of costs, but no cause was ever shewn, Notes in C. B. 202. Pasch. 6 G. 2. *Alsop v. Bagott*.

2. A question did arise, whether the day to be inserted in the English notice to appear upon process pursuant to the late act of parliament, should be the *essoïn-day* of the return, or the *quarto die post*. Court held, that it must be the *essoïn-day*, which in this court is the return-day, and not the *quarto die post*, which is only a day of grace. Notes in C. B. 204. Trin. 6 and 7 Geo. 2. *Alsop v. Nichols*; cites *Dyer* 269. pl. 21. Co. Litt. 135. Finch. 427. Carth. 172. Sid. 229. Salk. 626. pl. 8. *Harvey and Broad*, pl. 9. *Davis and Salter*.

3. Upon hearing counsel on both sides, and after taking time to consider, the Court were of opinion, that a notice to appear on Monday January 21, as the return-day of *Q. B. Hill*. was bad; it ought to have been to appear on the 20th, which, although it be Sunday, is the true day of the return. Notes in C. B. 206. Hill. 7 G. 2. *Green v. Watkins*.

(C) Who are demandable.

[1. IF an attorney of the Common-Pleas sues an action there, he shall not be demanded, because he is supposed always present aiding the Court. 20 H. 6. 44. b.]

Fitz. Jour. pl. 33. cites S. C. & S. P. Per Brown and

Newton, though Newton before held e contra.

2. An information was exhibited against the *Custos breviarum* of B. R. for abuses and misdemeanors committed in his office. He at first refused to appear in person, but offered to appear by attorney; but the Court were of opinion, that he cannot appear by attorney, in as much as he was an officer of the Court, and presumed to be always present. Sid. 134. Pasch. 15 Car. 2. B. R. *The King v. Paget*.

(D) At

(D) *At what Time the Parties are demandable.*

Fitzh. Jour. pl. 33. cites S. C. [1. **I**n an action of debt, after a demurrer upon the plea in bar, the plaintiff is demandable. 20 H. 6. 44. b.]

After demurrer joined, if the Court gives a day over, the plaintiff or demandant is demandable at that day, and therefore may be nonsuited. Co. Litt. 120. b. (o) and in *Moir*, cites 9 H. 5. 5. and § 2. Nonsuit 34.

[436] [2. If the bishop certifies a man to be a bastard or mulier, he is not demandable, but judgment shall be given. 20 H. 6. 44. b.]

3. Where the second deliverance is not served, the defendant shall not compel the plaintiff to count against him, though he has day by the Roll. Br. Jour. pl. 35. cites 21 E. 3. 43.

Br. Jour. pl. 17. cites S. C.—Br. Brief, pl. 291. cites S. C. 4. In *formedon* the tenant may appear at the first day, and may abate this writ, and a new writ may be brought bearing date *mesue* between the first day and the fourth day, and for this it shall not abate. Br. Jour. pl. 33. cites 24 E. 3. 24.

5. The tenant is not bound to appear at the first day unless in writ of right after the mise joined. Br. Jour. pl. 17. cites 24 E. 3. 24.

6. In debt against executors, they were at issue, and the Court rose and were going to their houses after the inquest charged and sent together, and after they were warned that the inquest was ready to give their verdict, by which they came back and would not demand the plaintiff, because the Court was risen; but took their verdict in case of the jury, so that they might take meat and drink and go to bed, who found for the defendant, and the justices charged them to remain together at their case, and to come back the next day, when the Court is sitting, and give their verdict again, quod nota, and then the plaintiff shall be demanded, and may be nonsuited. Br. Verdict, pl. 9. cites 2 H. 4. 21. 22.

Br. Jour. pl. 62. cites S. C. 7. In *formedon* the demandant is demandable the first day, and if he does not come, and no essoin be cast for him, the default shall be recorded the first day, and judgment shall be given upon this the fourth day after. Br. Default, pl. 23. cites 12 H. 4. per Hank.

8. But the tenant has no occasion to appear before the fourth day, and the entry is *obtulit se quarto die*, &c. Ibid.

9. In account the plaintiff shall not be demanded to be nonsuited at the first day, nor till the fourth day. Per Hank. clearly. Br. Jour. pl. 63. cites 14 H. 4. 19.

Default in writ of right at the first day, is peremptory. Br. Jour. pl. 85. cites Fitzh. Droit 27.

Br. Jour. pl. 40. cites S. C. 11. In *assise*, if day is given to the parties by adjournment to *Westminster 15 Pasche*, the parties shall not be demanded till the 4th day. Br. Demand, pl. 12. cites 1 H. 6. 4.

12. But where day is given *Die Lune*, or *Die Martis*, &c. they shall be demanded the very day, quod nota. Ibid.

Where the imparlance 13. Where a man imparles to no day certain, there his appearance

once is of record at every day all the term, so that he cannot be nonsuited in this term; and so see that there is no diversity where he imparles the same day, whether he imparles to no day certain, and whether he imparles to any day certain, be it in this term, or in another term; for *where any day certain is given, he is demandable, contra where no day certain is given.* Br. Departure in Despite, pl. 1. 3 H. 6. 14.

but it is otherwise where the imparlance is to a certain day; for in such case the parties are not demandable till the day. Jenk. 81. pl. 58. ad finem.

is general, but parties ought always to attend the Court, and are demandable at the pleasure of the Court.

14. In writ of right the party is demandable at the first day, and effoign lies at the first day, therefore the sheriff cannot serve the writ after it; but the fourth day is for appearance, and this by the curtesy of the law; per Prisot; but the entry is quod querens obtulit se 4to die against the defendant, et ipse non venit. Br. Jours, pl. 7. cites 33 H. 6. 42.

15. And per Lakon, he who is bound to appear, his appearance shall not be recorded nor accepted till the fourth day, &c. Ibid.

16. Audita querela upon a release made after judgment in trespass, and *ve. fa.* issued against him who released, and the sheriff did not return the writ, and the defendant prayed that the plaintiff be demanded, et non allocatur; because the writ is not returned served notwithstanding he has day in Court. Br. Jours, pl. 51. cites 6 E. 4. 9.

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17. At the grand cape, or petit cape returned, the tenant is demandable, per tot. Cur. and because he was not demanded tenant he brought writ of error thereof upon the recovery by default. Br. Demand, pl. 11. cites 21 H. 7. 31.

18. At common law upon every continuance, or day given over before judgment, the plaintiff might have been nonsuited, and therefore before the stat. 2 H. 4. [cap. 7.] after verdict given, if the Court gave a day to be advised, the plaintiff was demandable at that day, and therefore might have been nonsuit which is now remedied by the statute. Co. Litt. 139. b.

See tit. Nonsuit, (D) and (E) per totum.

19. The difference as to the demand is thus, (viz.) that the defendant or tenant is not demandable, but upon the quarto die post, but the plaintiff may be demanded primo die placiti, and for non-appearance may be nonsuited. Per Holt Ch. J. Carth. 173. Hill. 2 & 3 W. & M. in B. R. in case of Clobery v. the Bishop of Exon.

20. Where appearance of bail is not put in according to the paper act in eight days we must examine the matter in Court and make a record and give judgment; it is a question, whether bail must be filed within eight days after the writ returned, or after it is returnable; per Holt. Cumb. 326. Trin. 7 W. 3. B. R. Smith v. Butler and Ux.

21. An order was made in Chancery that the defendant should appear gratis at the hearing; this implies that he should not pray day over. Per Lord C. King. 2 Wms's Rep. 368. Trin. 1726. Jervoise v. O'Carrel,

(D. 2) Plaintiff Demandable.
In what Cases.

8. C. Br. Scire Facias, pl. 193. accordingly, and if the issue be found for the plaintiff, nothing shall be done but to award the defendant to the Fleet; and if found against him, then the award shall be, that the plaintiff take nothing by his writ.

1. A MAN was out-lawed by name of J. S. husbandman, and came by *capias utlagatum*, and said, that at the day of the writ purchased he was hostler, and not husbandman, by which scire facias issued against the plaintiff, who came and maintained the writ, and they were at issue, and per Cur. the plaintiff is not demandable; for his suit is determined by the out-lawry, and he cannot be nonsuited, nor can he declare upon the original; contra in scire facias upon charter of pardon after out-lawry; for there the original is revived, and he may declare, and the other shall answer, and there the plaintiff may recover, or be barred, as the issue is found. Br. Demand, pl. 55. cites 21 H. 6. 50.

Br. Enquest, pl. 44. cites 8. C. 1.

2. In debt, they were at issue upon specialty *non est factum*, and jury charged, and upon this the defendant confessed the deed, and shewed matter in conscience of damages; by which the inquest was charged upon the damages and costs, and came back; and therefore at this day the plaintiff shall not be demanded; for he shall not be nonsuited; for because he has confessed the issue, therefore the jury is now only an inquest of office, at which there shall not be any party demanded. Br. Jours, pl. 55. cites 16 E. 4. 1.

[438] (E) To what Appearance.
[At what Time the Parties may appear and plead,
in Respect of the Action.]

See tit. Continuance (B) pl. 2. S. C. and the notes there.

[1. IN replevin, if the process continues till a pluries issues out of Chancery, and the sheriff thereupon returns in Bank, that the defendant claims property, though by this writ no day is expressly given to the parties, but to the sheriff only, to excuse his contempt for not serving the process before, yet upon the return of this writ, the parties may appear and plead, scilicet, the plaintiff may declare, and the defendant plead thereto; and this will not be erroneous, for there is no other writ to be sued after this writ, and therefore if the parties cannot plead thereto, they would be at great mischief. Trin. 38 El. B. R. between Gawen and Ludlow, adjudged. Quære. D. 8 El. 246. 67.]

[2. So in this case, if the pluries be returned *træ Michaelis*, and nothing is done in term, nor till Easter after, yet at this term the parties may appear and plead if they will. Trin. 38 El. B. R. between Gawen and Ludlow, adjudged.]

(E. 2) Appearance. Aided by it; What.
Defects in Mesne Proceſs, &c.

1. **W**AST in *Suffex*, the *proceſs* was continued in *Effex*, and because it was well continued by the record, and now the defendant is ready in court, the *proceſs* was awarded good. Br. Discontinuance de Proceſs, pl. 15. cites 38 E. 3. 20.

2. In a *baſe Court* the summons was *ita quod ſit coram ſeclatoribus*, and in the Roll this word (*coram*) was wanting, and the tenant appeared and pleaded, and loſt, and for this cauſe brought of falſe judgment, et non allocatur; for when he appears by the summons he ſhall not take advantage to ſay he was not well summoned. Br. Summons, pl. 22. cites 46 E. 3. 30.

3. So if he be eſſaigned; for all this affirms the summons. Ibid.

4. Executors ſued execution of damages recovered by their teſtator, the defendant alleged acquittance of the teſtator, and writ iſſued againſt the executors to answer to it returnable Oſt. Hill. and the ſheriff returned that he warned them, and they did not come, by which the defendant went quit. Br. Peremptory, pl. 64. cites 47 E. 3. 24.

5. If a man comes by one writ, where he ought to come by another, yet he ſhall answer. Br. Reſponder, pl. 12. cites 12 H. 4. Per Hank.

6. *Quare impedit* againſt a patron and incumbent, who appeared at the diſtreſs, and ſaid, that the pone is not ſerved againſt the incumbent, and prayed new pone, et non allocatur, but were awarded to answer because they appeared; and ſo it ſeems that a *miſcontinuance of proceſs* is not material where the parties appear, ſo that judgment is upon their plea, or at appearance, and not upon their default. But otherwiſe it ſeems of *diſcontinuance of proceſs*. Br. Discontinuance de Proceſs, pl. 14. cites 9 H. 5. 3. and ſays that ſo it ſeems. [439]

Br. Ibid. pl. 1. which cites 3 H. 6. 3.

7. Default after *imparlance in action real or perſonal on the part of the defendant, tenant, or vouchee*, is peremptory, and in the one caſe the plaintiff ſhall recover his debt and damages, and in the other, the demandant ſhall recover *ſeiſin of the land*, without petit cape being awarded, quod nota. Br. Peremptory, pl. 27. cites 38 H. 6. 33 & 39 H. 16. 17.

8. *Scire facias* out of a *fine* was returned *tarde*, and the plaintiff brought other *ſcire facias* returnable 15 Mich. which was not a *common day*, but too late; and per Moile and Chocke, when the party appears this is no matter. Br. Jours, pl. 36. cites 9 E. 4. 18.

the return, yet, if he has only 11 days, if he appears it is good, and he ſhall be compelled to answer; and ſo it was by award; quod nota. Ibid.

Where *ill proceſs* is awarded, and the tenant appears, he ſhall be compelled to answer, per Needham. Br. Proceſs, pl. 81. cites 9 E. 4. 18.

And per Danby and others, upon *ill day* awarded, and he appears, he ſhall answer. Ibid.

9. Note, per Moile, if the *process* be *miscontinued*, yet if the party appears he shall answer. Br. Responder, pl. 47. cites 9 E. 4. 18.

10. And in *affise* if the *tenant* be not attached *fifteen days* before the day of *affise* he shall not answer. Ibid.

11. And in other *actions*, if there are not fifteen days between the teste of the writ and the day of the return, the defendant shall not be compelled to answer. Per Chocke. Br. Responder, pl. 47. cites 9 E. 4. 18.

12. But in those cases it seems, that he ought to plead this exception. Ibid.

Br. Joura,
pl. 36. S. P.
cites S. C.

13. And per Needham, if *distress* issues by *pone*, or *capias*, where it should be *pluries capias*, and the party appears, he shall be compelled to answer. Br. Responder, pl. 47. cites 9 E. 4. 18.

14. But if he has day, which he ought not to have by the law, he shall not be compelled to answer; note the diversity. Ibid.

15. Miscontinuance of process (as where one process is awarded for another, or mis-returned) may well be aided by appearance of the parties; but discontinuance in appeal of murder is not. Cro. J. 283. pl. 4. Trin. 9 Jac. B. R. in case of Bradley v. Banks.

Jenk. 335.
pl. 73. S. C.

16. The error assigned in a judgment in assumpsit was, that the defendant was sued by the name of Sir Francis Fortescue, Knight of the Bath only, when he was both Knight of the Bath and Baronet; but because he appeared to that name and pleaded, the judgment was affirmed. Cro. J. 482. pl. 15. Pasch. 16 Jac. B. R. Sir Francis Fortescue v. Markham.

17. Where judgment is given by default upon a process, and there was no appearance, the process ought to be according to law. But where it is given upon verdict or by default after the party has appeared and pleaded, there, a miscontinuance will not hurt at the common law; for the defendant slipped his advantage when he appeared and pleaded. Jenk. 57. pl. 5.

18. At this day, if judgment be given by default, a discontinuance, or miscontinuance before appearance is not aided, but such judgment is reversible. A miscontinuance is, where the continuance is made by undue process; a discontinuance is, where no continuance is made at all. Jenk. 57. pl. 5.

In false imprisonment the defendant justified by capias

19. Wrong process, as a summons instead of a scire facias, or a capias instead of a venire facias, is cured by appearance, for upon defendant's appearance, the process is at an end. Jenk. 57. pl. 5.

on a suit commenced against the plaintiff in an inferior Court. Plaintiff demurred, because it was not shewn that a summons was issued first, and inferior courts can award no capias, but on a summons first returned. Per Hale Ch. J. A fault in the process is aided by appearance, &c. yet * false imprisonment lies here on it, and the officer cannot justify here as upon process out of the Courts of Westminster. Vent. 120. Trin. 24 Car. 2. B. R. Read v. Wilmot.

Appearance aids error in process where a capias issues without an attachment in an inferior court: 2 Ld. Raym. Rep. 1544. Mich. 2 Geo. 2. Blenkinson v. Iles.

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Cro. J. 311.
pl. 10.
Mich. 10.
Jac. B. R.
Lovelace v.

20. Debt was brought for 40l. At the pluries capias, an entry was made upon the Roll of the process *quod quer' obtulit se in placito debiti 40s.* At the exigent, the defendant appears and confesses the action; the plaintiff has judgment upon it. The said appearance takes

takes away all discontinuance and bad process before it; and the said words 40r. in the oblitul se, is superfluous. Judgment affirmed in error. Jenk. 341. pl. 99.

Jeniper.
S. C.

21. It was affirmed by Keeling J. that the law is, and hath been adjudged, that *ill addition, or no addition*, is cured by the appearance of the party. Sid. 247. pl. 11. Pasch. 17 Car. 2. B. R. in case of the King v. Warren.

Denied
Hill. 11.
Gen. 2. in
case of the
King v.
Haddock.

22. Though one do *appear in court upon the return of the writ* issued forth against him, yet he doth *not admit the writ to be good* by such his appearance; for he cannot have oyer of the writ until the party hath declared against him (Hill. 22. Car. 1. B. R.) for he is arrested upon a warrant made by the sheriff upon the receipt of the writ, and doth not see the writ. And the law will not presume any person to admit a thing, which he knows not what it is, and may be prejudicial to him to admit it. L. P. R. 83.

23. If one *appear by a name, which is not in truth his right name*, and thereupon the plaintiff declares against him by that name, he shall be estopped after to say that he is not right named (20 O&A. 1650. B. S.) for he shall not be suffered to take advantage of his own wrong to prejudice another thereby. L. P. R. 85.

24. Where the *first process in an inferior court is a capias*, (which ought not to be) it is salved by an appearance. Lutw. 954. Because the defendant hath by his appearance admitted the process by which he is brought into court to be legal. L. P. R. 85.

25. Error in *Exeter Court*. The error assigned was, that there was *no summons*; and for that cited 2 Cro. 108. which was said to be the same case with this. But, per Curiam, it was held to be well enough; for by appearance all defaults before are salved, though it be in an inferior court; and so Wyld said, it had of late been constantly ruled, contrary to 2 Cro. 108. Freem. Rep. 468. pl. 642. Trin. 1678. Wheeler v. ———

Cro. J. 108.
pl. 4. Hill.
3 Jac. B. R.
Pratt v.
Dixon.

26. Exception was taken to a *return*, because it was said, *corpus præfat' &c. parat' habeo &c. ubicunque*, the which is uncertain, and not according to the form of the return; for though the writ be, *that he should have the body in the King's Bench ubicunque*, because it is uncertain where the Court shall be at the day of the return, yet when the day is come, he ought to *return the body into court*, which then is in a place certain, and not to say he had the body ubicunque, the which the Court said was a *blunder*, but it is aided by the appearance. Skin. 444. Trin. 6 W. & M. in B. R. Wilson v. Law.

Ld. Raym.
Rep. 20.
S. C. & S. P.
according-
ly.

27. If the *writ and return* had been ill, the appearance had aided it, if the *party appears and pleads*; but if he *appears and takes exception* for a defect in the writ and return, such defect is not aided by appearance; but if he *pleads over* he waves the advantage of such exception, and he was ruled to proceed to trial. Per Eyres J. Skin. 554. Mich. 6 W. & M. in B. R. Wilson v. Law.

Ld. Raym.
Rep. 21.
S. C. & S. P.
by Eyre J.
but when
the party
comes and
demurs on
the process,

this appearance will not aid any defects in the process; but as to this, the other judges gave no opinion.

Default. Appearance.

28. A writ of error was executed the same day with the return of the pone, and so might be before any pone issued out. And judgment was reversed for this error, for no appearance can help that. 12 Mod. 524. Trin. 13 W. 3. B. R. Bidolph v. Veal.

29. *Sci. fa.* upon a fine wanted the due number of days, because the teste and return, and that writ did partake of the nature of a real action, yet if party appeared and pleaded to it, it made it good. Per Holt Ch. J. 12 Mod. 452. Pasch. 13 W. 3. B. R. in case of Wilmot v. Tiler.

30. So if writ of covenant to levy a fine wants fifteen days between the teste and return, yet if party appear, and fine be levied it is good. This indeed has been after questioned by some judges, but was adjudged to be a stated doctrine, and needs no new settlement; for if the defendant appears and answers without taking advantage of this fault of the writ, as if it were in assise, and he not attached fifteen days before, the fault of the writ is thereby cured. Per Holt Ch. J. 12 Mod. 452. In case of Wilmot v. Tiler.

31. Irregularity of the delivery of a declaration is made good by appearance. Per Cur. Ld. Raym. Rep. 706. Mich. 13 W. 3. Walgrave v. Taylor.

2 Salk. 383.

pl. 34. Mich.

9 Ann. B. R.

in case of

the Queen

v. Barret. S. P.

— 8 Mod. 257. S. C.

32. Appearance, and the party being heard, supplies want of summons in summary proceedings. 2 Salk. 428. Mich. 8 W. 3. B. R. The King v. the Mayor &c. of Wilton.

33. Defendant moved to stay the proceedings, the process not having been served upon him, but upon another person, it was insisted by plaintiff that an appearance being now entered, the defendant was in court, and the mistake was cured. But per Cur. The appearance is entered by the plaintiff, according to the statute, and by no means cures the mistake. Barnes's Notes in C. B. 291. Trin. 8 & 9 Geo. 2. Westfall v. Finch.

(F) Appearance. At what Time.

In what Cases a Man [or Corporation, pl. 8.] may appear where the Process is not served.

Fol. 58a.

[Or where it is not returned, or returned Nihil, pl. 7. 9. 12. 13.]

Where an Inheritance is to be lost, or other Thing.

Br. Jours.
pl. 93. cites
S. C.

[1. **W**HERE a man is to lose an inheritance if he does not appear, he shall appear without a return of the sheriff gratis by the day in the Roll. 10 H. 7. 11. b.]

* Fitzh.
Voucher, pl.
135. cites

[2. As in a sequatur sub periculo against a vouchee, he may appear at the day of the return, though no writ be returned, for that otherwise

otherwise he should lose in value. * 22 Ed. 3. 4. adjudged. 7. b. S. C.—
adjudged. 29 Ed. 3. 40. b. 2 Ed. 3. 40.] Br. Joura,
pl. 93. cites

10 H. 7. 11. S. P.——S. P. though it be returned tarde, for the mischief of the tenant. Br.
Averment, contra, &c. pl. 21. cites 11 E. 4. 9.——But where upon *warrantia chartæ*, nihil
is returned, and he appears, he shall not be received. Br. Averment contra, &c. pl. 21. cites 11
F. 4. 9.——So upon *summons ad warrantizandum*, and so alias, pluries. Br. Averment contra,
&c. pl. 21. cites 11 E. 4. 9.

[3. If the defendant be out-lawed in debt, and after hath a char- [442]
ter of pardon, and sues a *scire facias* against the plaintiff, if the * Br. De-
writ be not returned, the plaintiff cannot appear by the roll, for he fault, pl. 49,
is to lose nothing. * 39 Ed. 3. 7. b. Contra, † 27 Ed. 3. 77.] cites S. C.
the plaintiff
could not

be received to appear gratis by the roll, because the writ was not served, and so he was forced to
procure another writ to warn himself; quod nota, & sic fecit.

† Fitzh. Responder, pl. 85. cites S. C.

[4. But if the writ be returned tarde, the plaintiff may appear. Fitzh. Ref-
27 Ed. 3. 77.] pender, pl.
85. cites

S. C.—Br. Joura, pl. 48. cites 3 H. 7. 8. S. P.

[5. When a man is to have a corporal pain if he appears not, * Br. Joura
he may appear without the return of the sheriff gratis by the day in pl. 93. cites
the Roll. * 10 H. 7. 11. b. Curia. 39 Ed. 3. 7. b.] S. C.—
Br. Default,
pl. 64. cites

3 H. 7. 8. S. P.—Br. Joura, pl. 48. cites 3 H. 7. 8. S. P.

[6. In trespass, if after the exigent is issued, the defendant ren-
ders himself, and hath a *superseas*; though the sheriff does not
return the exigent at the day, yet he may appear by the roll.
38 Edw. 3. 20. b. adjudged.]

[7. In a *scire facias* against a garnishee, if the sheriff returns Br. Aver-
nihil, &c. and so upon the alias, the garnishee cannot appear gratis ment con-
by the day in the roll, because he is not to have corporal punish- tra, &c. pl.
11. cites S.
C. That he
had a day in

court by the roll, and therefore was received. Per Cur. quod nota.
In detain the defendant prayed garnishment, and had it, and the sheriff returned *nihil*, and *sicut*
alias issued, and the sheriff returned *nihil* again, and the garnishee came and prayed, that the plain-
tiff might declare against him, and was received; for he had day by roll, and so appeared contrary
to the return of the sheriff, quod nota. Br. Default, pl. 37. cites 8 H. 6. 16.

[8. In a *quod permittat* against a bailiff and commonalty, if at
the return of the grand distress no writ is returned, the bailiff can-
not appear gratis by the day in the roll without the commonalty
(for they are but one corporation.) 29 Ed. 3. 40. b. adjudged.]

[9. In an *audita querela*, if the defendant be returned *nihil per*..
quod potest summoniri, yet he may appear gratis. 21 Ed. 3. 13. b.
adjudged.]

[10. In a writ of debt, if no original be returned, nor any return Br. Debt.
made, yet the defendant may appear by the roll. 29 Ed. 3. 18.] pl. 109. S. P.
cites 9 E. 4.
23.

[11. But he cannot compel the plaintiff to count against him, be-
cause perhaps there is no original. 29 Ed. 3. 18.]

S. P. Per
Littleton.
Br. Aver-
ment, con-
tra, &c. pl.

21. cites 11 E. 4. 9.

If in debt or trespass the sheriff returns the capias nihil, and the defendant comes ready to plead, he shall be received, and the reason seems to be, that in this case there is corporal punishment. Br. Averment, contra, &c. pl. 6. cites 48 E. 3. 1.

But where there is no corporal punishment, nor the party is at no mischief, he shall not be received to plead upon a return of nihil. Br. Averment, contra, &c. pl. 6. cites 48 E. 3. 1.

For in præcipe quod reddat, if the tenant vouches, the vouchee may appear, and plead at the first day. But if he be returned nihil upon the summons, he shall not be received till the sequestar; for then is the land to be lost, therefore at the sequestar he shall be received. Br. Averment contra, &c. pl. 6. cites 48 E. 3. 1.

[443] [13. [So] If the sheriff returns *mandavi ballivo libertatis, qui nihil inde fecit*, yet the defendant may appear gratis. 27 Ed. 3. 78.]
Br. Averment, contra, &c. pl. 34. cites S. C. and Fitzh. Process, 15. But Brooke says, it does not appear there what process he made, which was so returned.

14. Executors brought *scire facias* against the defendant for damages recovered by the grandfather of the testator, and the sheriff returned nihil, by which the plaintiff had execution, and the defendant brought *audita querela* upon a release of the testator, upon which venire facias issued against the executor, which writ was not served, and yet the executors came ready to plead, and were received by award, notwithstanding that the writ was not served. Br. Averment contra, &c. pl. 25. cites 21 E. 3. 13.

15. In debt the defendant was out-lawed, and had charter of pardon, and *scire facias* against the plaintiff, which was not returned, and the plaintiff appeared and prayed that the defendant be demanded, inasmuch as the plaintiff has day by roll, & non allocatur, inasmuch as the process was not served; contra, where the party is to have corporal punishment or dures, by which the plaintiff, by advice of the Court, sued *scire facias* to have himself warned, so that he might appear. Br. Averment contra, &c. pl. 26. cites 39 E. 3. 7.

16. In trespass the sheriff returned quod cepit corpus, and had him not at the day, by which, upon change of the sheriff, issued *distingas quondam vicecom. ad habend. corpus against the old sheriff*, and he amerced, and the new sheriff returned quod distrixit quondam vicecom. but had not the body; and per Thorp the defendant may appear and plead, notwithstanding the return. Br. Averment contra, &c. pl. 33. cites 44 E. 3. 2.

17. In second deliverance, the sheriff returned no writ, but the defendant appeared, and prayed that the plaintiff count against him, or that he might have return irreplevisable, and could not have it, but sicut alias, and yet he had day by the roll. And so it seems that a man shall not be received contrary to the return of the sheriff, nor where the sheriff does not return, unless in case where he is to be at a loss, or to have corporal pain. Br. Averment contra, &c. pl. 28. cites 49 E. 3. 2.

18. In præcipe quod reddat, the tenant vouched, and process continued

sinued against the vouchee till the sequatur, which writ was not served, and the tenant said that the vouchee died between the issuing of the writ of sequatur, and the day of the return, and prayed that he might re-vouch. Br. Averment contra, &c. pl. 27. cites 14 H. 6. 7. And the same year, fol. 19. the better opinion of the justices was, that he shall have the plea.

19. *So where the tenant vouches, and the summons and grand cape be returned served, and the vouchee does not come, the tenant may say that the vouchee is dead; for if judgment be given against a dead person, it is error; for at those times the land is to be lost. Br. Averment contra, &c. pl. 27. cites 14 H. 6. 7. 19.*

20. *So at the second return of nihil upon scire facias upon charter of pardon after outlawry, he may appear gratis, otherwise the charter shall be allowed without answer. Br. Averment contra, &c. pl. 27. cites 14 H. 6. 7. 19.*

21. *In replevin at the pluries the sheriff returned quod averia elongata sunt, and withernam was awarded of the goods of the defendant for the plaintiff returnable 15 Mich. and the sheriff returned tarde, and the defendant came and was ready, and prayed that the plaintiff should count against him. And the best opinion was, that because no pledges de prosequendo & de returno habendo si, &c. are found, and also the writ is not served, therefore it is in a manner contrary to the return of the sheriff. And per Ardern and Danby he cannot appear; for without return of the sheriff, it cannot appear to the Court if he be the same person or not, and especially as here, where he is not to have corporal punishment. But where capias or exigent is awarded, he may appear, by reason of avoiding corporal punishment. But where * issues are to be lost, and the writ is not served, there he cannot appear; and also he cannot appear before pledges are found; for in debt if the defendant be returned summonitus est, and no pledges returned, the defendant shall not be put to answer, nor the plaintiff shall not be demanded; for he cannot be nonsuited before pledges found, quod tota Curia concessit. And he who is vouched may enter into the warranty the first day, but if process be awarded which is not served, he cannot enter gratis; and Newton agreed that he shall not answer as here. Br. Averment contra, &c. pl. 12, cites 22 H. 6. 20.*

22. *In debt at the capias the sheriff returned cepi corpus, & languidus in prisona, &c. by which issued duces tecum, and the sheriff did not return the writ, but the defendant appeared and prayed that the plaintiff count, and it was greatly debated, if he might appear before the writ came in; and the best opinion was, that because the plaintiff did not deny but that he who appeared is the same person, that therefore he ought to declare, notwithstanding that he shall be intended to be in ward of the sheriff by the first return; for it may stand with that that he was then in prison & languidus, and now at large and found, and therefore the plaintiff declared, and the defendant prayed to be by attorney, and the Court advised. Br. Default, pl. 67. cites 5 E. 4. 69.*

23. *In audita querela venire facias issued against the defendant,*

* Br. Default, pl. 41.
S. P. and
cites S. C.
|| Br.
Pledges, pl.
32. cites
S. C.

and the *sheriff* did not return the writ, and the defendant came gratis and prayed that the plaintiff be demanded & non allocatur, because the writ is not returned served, and he is not to have corporal pain. Br. Averment contra, &c. pl. 30. cites 6 E. 4. 9.

Br. Jours,
pl. 81. cites
S. C.—
Br. Respon-
der, pl. 58.
cites S. C.

24. *Replevin sicut pluries*, the *sheriff* returned that the plaintiff was *essoigned*, so that he could not have the view; for it was in homine replegiando, and no day was given to the defendant, but to the *sheriff* to know, &c. and per tot. Cur. the appearance is good for the mischief of *withernam*; for when the *sheriff* returns *elongata*, and if the defendant has not appeared, *capias* in *withernam* shall be awarded, by which he shall be imprisoned; by which it was awarded that the plaintiff recover his damages, and so the appearance of the defendant good at the day of the return of the *essoignment*, quod nota. Br. Default, pl. 71. cites 7 E. 4. 5.

25. *Scire facias upon annuity recovered*, the *sheriff* returned quod nihil habet nec est inventus, the defendant came and said that he had resigned before the writ purchased to the ordinary at D. and so not parson; and per Cur. the defendant may plead this, though he has no day in Court by return of the *sheriff*; because the defendant is at a mischief; for upon the first *scire facias* returned upon a recovery, the plaintiff shall have execution; for he who recovers shall have favour, and the same at the *capias* & exigent; but because he is not parson, nor warned as parson, J. B. Rector de D. therefore no mischief; for the execution shall issue only against the parson. Br. Scire Facias, pl. 178. cites 8 E. 4. 15. 19.

26. But in *scire facias upon charter of pardon*, there shall be two *nibils* returned before that the charter shall be allowed, if the plaintiff does not appear before. Br. Scire Facias, pl. 178. cites 8 E. 4. 15. 19.

27. Where a man is bound to appear upon writ at a certain day, it is no plea that the writ is not returned; for he may have special entry of his appearance: but it is a good plea that the bailiff to whom he is bound kept him in prison till the day of his appearance; [445] for he shall not gain a forfeiture by his own act. Br. Dette, pl. 109. cites 9 E. 4. 23.

28. A man appeared by *capias utlag.* and pleaded the last term, and had day to 15 Mich. and came at Octab. Mich. and prayed that his appearance be recorded for all the term, and Townsend would not before the day, but Brian and Catesby [bid them] record it. Conisby said, it has been done between party and party, but not where the King is party as here. Per Townsend, in appeal he ought to appear at every day, and shall not have his appearance recorded as here, but per Conisby the contrary has been done, where he is a poor man. Br. Default, pl. 63. cites 1 H. 7. 27.

S. P. though
he has day
by the roll,
because he
is not to
have corporal pain.

29. In error the *scire facias* against the defendant was returned nihil, and *sicut alias* issued, the defendant was not received to appear gratis. Br. Default, pl. 64. cites 3 H. 7. 8.

Br. Jours,
pl. 48. cites
S. C.

30. Contra upon *capias* or distress, where corporal punishment is to be had, or issues to be lost, and the same in *scire facias* upon charter

ter of pardon, as upon this scire facias. Br. Default, pl. 64. cites 3 H. 7. 8.

31. So where the sheriff returns *tarde* or *embezzils the writ*; Br. Joura, pl. 48. cites for it was said that he *has day by the roll*, et non allocatur here. S. C. —
Ibid. Br. Aver-

ment contra, &c. pl. 38. cites S. C.

32. *Scire facias upon writ of error*, the sheriff returned *nihil*, the defendant came and prayed that the plaintiff should assign the errors, et non allocatur, inasmuch as the writ is not returned served, and yet he has day by the roll. Br. Averment contra, &c. pl. 32. cites 3 H. 7. 8.

33. But, per Cur. where the sheriff returns *upon capias quod non est inventus*, the defendant may appear and plead; for otherwise he shall have corporal punishment by arrest by other capias, per Cur. Br. Averment contra, &c. pl. 32. cites 3 H. 7. 8.

34. So upon distress in salvation of the issues; for this is a loss, quod nota, per Cur. by which sicut alias issued. Br. Averment contra, &c. pl. 32. cites 3 H. 7. 8.

35. Where a man has *day by the roll ad respondendum*, he may appear as well upon the roll, as upon the writ; but when it is *ad satisfaciendum* he shall never be received to render himself to prison, unless the writ be returned, viz. cepi corpus, or capias ad satisfaciendum, or reddidit se upon exigent; per Mordaunt. Kelw. 166. b. pl. 3. Hill. 5 H. 8.

36. Upon a *capias* against A. the sheriff returns *him sick*, so that he cannot have his body at the day without the danger of his death; upon affidavit that A. is grown well a *duces tecum*, subpoena of a certain sum of money shall be awarded to the sheriff, to have his body in Court at a certain day. Jenk. 94. pl. 82.

37. In *debt*, *trespass*, or other personal action against A. upon the summons or attachment, the sheriff returns, *non est inventus & nihil habet* in his bailiwick; at the day of this return A. cannot appear. Jenk. 94. pl. 82. & 122. pl. 47.

38. But upon a *capias* against him to imprison his body, or upon a process, upon which issues are to be lost, or land to be lost, or his life brought into danger, he may appear, although such a return as above were made by the sheriff; for he has a day in Court by the roll, and his non-appearance would be of great prejudice to him. Jenk. 94. pl. 82. & 122. pl. 47.

39. In an appeal against A. for the death of a man, the sheriff returns, that the writ came too late to him; A. may appear and plead notwithstanding this return. Jenk. 94. pl. 82. & 122. pl. 47. [446]

40. Whenever a writ returnable is awarded, the return day is a day to both parties to appear, and though the writ be returned not served, the defendant may appear to prevent any ill consequences, as to prevent a *capias*, 5 E. 4. 69. So here to save himself on a *withernam*, respond. 57. [52] 7 E. 4. 5. Upon a *distingas proximas villas*, &c. the defendants have no day, yet they may appear and traverse. In a common *replevin* the original gives no day, for this is *vicentiel*, and so is the alias, but the pluries is returnable in

Default. Appearance.

B. R. and though there is no summons nor attachment in the writ, yet the *day of the return is a day to the parties* and the entry is *attachiatus est ad respondend' de placito quare cepit, &c.* and the reason is because though in truth there was not actually an attachment, yet virtually and in consequence of law it is so, he being bound upon peril of a withernam. 2 Salk. 583. pl. 3. Mich. 12 W. 3. B. R. Moor v. Watts.

41. By the ancient rule of court, there could not be a voluntary appearance *without a writ* was taken out, but even now there must be a writ *taken out before or after*; for without a writ the parties have no day in court, without which they cannot appear; and he sees no *difference between a voluntary appearance and one upon a cepi corpus*, for sure the plaintiff ought not to be put in a worse condition for his kindness in not arresting the defendant. If a writ be returnable *Craft' Animar'* and a voluntary appearance to it, it will be the same, as if it were upon a cepi corpus. Per Holt Ch. J. 12 Mod. 404. Trin. 12 W. 3. B. R. Anon.

(G) In what Cases a Man shall be *compelled to appear [and answer] where the Process is not served.*

[1. IF a man *sues execution upon a statute*, and the *conusee sues an audita querela upon the acquittance of the conusee returnable immediately*, which is not served, and the *conusee* comes and *prays execution*, he shall be put to *answer to the acquittance* upon this writ, for he hath day by the roll, *though the writ is not served.* 30 E. 3. 21. b. adjudged.]

2. A. is *condemned in trespass* at the suit of B. and is *outlawed upon the judgment* and is *execution upon a cap. utl.* B. releases to A. *all executions*; A. upon this release brings an *audita querela*, upon this a *venire facias* against B. B. cannot appear, for he is not to lose his liberty, or issues, or freehold; an *alias venire facias* issues, and is served and returned; B. appears, and pleads the said outlawry against A. and 'tis a good plea; for the *audita querela* is only to defeat the execution, and not to reverse the judgment as error would do *ex directo*, and an *attaint ex consequenti*. Jenk. 126. pl. 55.

[447] (G. 2) Appearance. Necessary to what Purposes.
Or, what cannot be done without Appearance.

1. IN *informations and indictments*, no judgment can be given, unless the defendant appears. Per Eyre J. 10 Mod. 250. Hill. 3 Geo. 1. B. R. in case of the Queen v. Simpson.

2. But judgment of *outlawry* may, because of his contempt for not appearing. Ut sup.

3. *Conviction of deer-stealers* may be without appearing, so that they

they be summoned, and make default. 10 Mod. 378. Hill. 3 Geo. 1. B. R. The Queen v. Simpson.

4. *Corruption of blood*, and *forfeiture of estate*, may be by *outlawry for treason or felony*; for the law interprets absence in such case as a sufficient evidence of guilt. 10 Mod. 379. Hill. 3 Geo. 1. B. R. in the case of the Queen v. Simpson.

5. In *real actions* the second default is final and conclusive, and the Court, without regarding the merits of the cause, will give judgment that defendant shall lose the land. 10 Mod. 379. in case of the Queen v. Simpson.

(H) In what Cases the Husband shall be obliged to appear for his Wife.

See tit. Baron & Feme, (1. a) (K. a) Fol. 583.

[1. **I**N an action against baron and feme in B. R. if the baron appears upon the exigent, he shall remain in prison till he puts in bail for his wife. Hill. 37 El. B. R. by Popham.]

[2. *As in an action of debt against baron and feme, for the debt of the feme, if the baron be taken by capias or exigent, he shall remain in prison till he hath put in bail for his feme. Hill. 37 El. B. R. by the clerks this is the common course.*]

[3. *But in an action against baron and feme in B. if the baron comes upon the capias or exigent, he shall not be compelled to put in bail for his wife. Hill. 37 El. B. R.*]

[4. *If the baron appears upon the original in B. R. where it is against him and his feme, he ought to put in bail for his wife. Hill. 37 El. B. R.*]

[5. *In an action of debt against baron and feme in B. R. upon the statute of recusants, for the recusancy of the feme, the baron, who is in custodia maris illi, shall remain in prison till he hath put in bail as well for his wife as for himself. H. 37 El. B. R. adjudged, the case of Philpot and Young, and their wives.*]

him in prison for the contempt of the feme, until the feme comes in, and therefore bail was refused; cites 8 H. 4. 6. 21 H. 6. 4. —Cro. J. 445. in pl. 23. Mich. 15 Jac. B. R. the S. P. Obiter said, that this had been the custom.

[448]*

[6. *But it is in the election of the Court, whether they will compel him to give bail for his wife or not, for all bails are in the discretion* of the Court. Hill. 37 El. B. R. Philpot and Young, and their wives.*]

Cro. E. 370. pl. 9. S. C. & S. P. accordingly. —Cro. J. 445. in pl. 3. S. P. Obiter.

[7. *In an action of debt brought against baron and feme in banco, if the baron appears, and the feme makes default—*]

This is imperfect.

[8. *If process issues out of B. R. scilicet, a latitat against baron and feme, and the feme is arrested, but not the baron, the baron in this case shall not be compelled by the course of the court to appear for himself and his wife, the baron not being arrested. Mich. 10*

Car. there cannot be any declaration, and therefore in 10

gard the
plaintiff
cannot de-
clare, the
baron being
returned

Car. B. R. between Story and Smith, per Curiam, and clerks; but they said, that if the baron had been arrested, and not the feme, the baron should have been compelled to appear for himself and his wife.]

non est inventus; the feme was dismissed. Cro. J. 445, pl. 23. Mich. 15 Jac. B. R. Anon. — Mod. 8. pl. 24. Mich. 21 Car. B. R. Twifden J. cites S. C. and says, it is to be understood, that he shall be discharged upon common bail; and Livesey said, that so the courie was.



9. In debt at the capias the sheriff returned quod cepit corpus, and that he is languidus in prisona, and yet the defendant was received to appear; for he has day by the roll, and prayed that the plaintiff be demanded, and so he was, and because he did not come, therefore he was nonsuited, quod nota. Br. Return de Briefs, pl. 102. cites 3 H. 6. 3.

10. And at the capias in trespass against the baron and feme, the sheriff returned the baron non est inventus, and that he had taken the feme, who was in ward, and protection was cast for the baron, and was allowed, and yet he had no day by the return of the sheriff, quod nota. Brooke says, the reason seems to be inasmuch as he is to have corporal punishment upon capias. Ibid.

(H. 2) Appearance. Against Return of the Sheriff.

Br. Averment
contra, &c. pl. 8.
cites S. C.

[1. IN trespass at the capias the sheriff returned non est inventus, yet the defendant may appear at the same day by attorney, or in proper person, at his pleasure. Br. Jours, pl. 20. cites 3 H. 4. 2.

Br. Averment
contra, &c. pl. 8.
cites S. C.

2. But it is said that after exigent awarded, he cannot appear by attorney, but first in person. Br. Jours, pl. 20. cites 3 H. 4. 2.

Br. Jours.
pl. 2. cites
S. C.—Br.
Averment
contra, &c.
pl. 9. cites
S. C.

3. In debt, at the capias the sheriff returned, quod cepit corpus & quod est languid in prisona, and yet the defendant was received to appear; for he has day by the roll, and prayed that the plaintiff be demanded, and so he was, and because he did not come, therefore he was nonsuited, quod nota. Br. Return de Brief, pl. 102. cites 3 H. 6. 3.

S. P. For
though he
has no day
by the re-
turn of the
sheriff, yet
he has day
by the roll.
Br. Jours.

4. And at the capias in trespass against the baron and feme, the sheriff returned the baron non est inventus, & quod cepit the feme, who was in ward, and protection was cast for the baron, and was allowed, and yet he had no day by return of the sheriff, quod nota. Brooke says, the reason seems to be inasmuch as he is to have corporal punishment upon capias. Ibid.

pl. 2. cites S. C.

—Br. Averment contra, &c. pl. 9. cites S. C.

[449] 5. Defendants plead in bar to the action, but do not appear and plead nec in propria persona nec per any attorney but only thus, et prædicti A. and B. per C. attornatum suum vim & injuriam

juriam quando, &c. and therefore judgment pro quer. 2 Lutw. 1386. Trin. 4 Jac. 2. Gardiner v. Peyton.

(I) *Departure in Despite of the Court.* In what Cases it is.

[1. IF the defendant or tenant *imparl to another day in the same term*, and *makes default at the day*, this is a departure in despite of the Court. 9 H. 6. 58. b.] Br. Departure in Despite, &c. pl. 2. cites S. C.
Cro. J. 293. pl. 12. Mich. 9 Jac. B. R. in case of Lilbourn v. Heron. S. P. ——— Bull. 161. S. P. in S. C.

[2. [So] if a man *imparls till another term*, if he makes default at the day of appearance, this is a departure in despite of the Court. 9 H. 6. 39. b. 41. b.] Br. Bill, pl. 6. cites 7 H. 6. 41. ——— Br. Continuances, &c. pl. 22. cites S. C.

[3. *But if the Court gives day to the defendant * till another term*, if the defendant makes default at this day, this is no departure in despite of the Court, for he departed by leave of the Court.] If a man appears and says nothing, the plaintiff shall recover for want of answer, and if he appears and make default in the same term, he shall be condemned; for this is a departure in despite. Per Vampage, Br. Default, pl. 34. cites 7 H. 6. 39. 41.

In debt the defendant pleaded release, the plaintiff denied it, and the defendant made default; and at another day the plaintiff recovered his debt, because the defendant did not maintain his plea; and it was said, that this was no departure in despite of the Court; for they had day over. Br. Default, pl. 24. cites 14 H. 4. 2.

* Cro. J. 293. pl. 12. the Court seemed to incline to that opinion.

[4. In a *real action* if the tenant *vouch*, and the demandant *has leave to imparl upon the voucher*, and returns, and the tenant is *demandet*, if he makes default, this is a departure in despite of the Court. 38 E. 3. 13. b.]

5. In *trespass* the defendant *appeared and pleaded*, and after *plea pleaded departed in despite*, and therefore writ of inquiry of damages was awarded, and after the plaintiff released the departure, and the defendant pleaded not guilty. Br. Departure, pl. 4. cites 9 H. 5. 15.

6. Note, that departure in despite is always of the part of the tenant or defendant, when his appearance is of record the same day, and retraxit is of part of the demandant or tenant, or plaintiff, when his appearance is of record the same day, and upon this he shall be barred, and of the part of the tenant or defendant he shall be condemned. Br. Departure in Despite, pl. 1. cites 3 H. 6. 14.

7. But *ibid.* says, that note that it appears 9 H. 5. 5. and 3 H. 4. 2. that where the defendant appears and imparles the same day, as he may well, there he is not demandable, and therefore if he makes default when the defendant comes back and pleads bar, or tenders his law, the plaintiff shall be barred, and shall not be suffered to be nonsuited; for this is a retraxit, because it is all one and the same day,

8. But

8. But if he imparles till another day, be it in the same term or in another term, and notwithstanding that it be to the next day in the same * term, there he is demandable, and if he makes default he shall be nonsuited, notwithstanding it be all in one and the same term; note the diversity, where the imparlance is all in one and the same day, as in the case of a common recovery, and where it is till another day in the same term. Br. Departure in Despite, &c. pl. 1. cites 9 H. 5. 5. and 3 H. 4. 2.

9. So it seems of the part of the defendant, tenant, or vouchee to warranty; for in a common recovery for assurance of land, the vouchee imparles and is demanded again the same day and makes default, and therefore judgment is given against the tenant, and he to have over in value. Br. Departure, pl. 1. cites 9 H. 5. 5. & 3 H. 4. 2.

10. Or if he had imparled till another day, and had made default petit cape ad valentiam should issue; nota inde bene. Ibid.

11. A departure in despite of the Court is on the part of the tenant, and is when the tenant or defendant after appearance, and being present in court, upon demand makes departure in despite of the Court; and then the entry is, et prædict' tenens seu defendens licet solemniter exactus, non revenit, sed in contemptum Curie recessit, & defaultam fecit, ideo, &c. Co. Litt. 139. a.

Fol. 684.

(K) What shall be said a Departure in Despite of the Court.

Fitzh. Re-
traxit, pl.
9. cites S. C.

[1. IF at the return of a *capias ad valentiam* the vouchee makes default, and the attorney of the tenant is *essoined*, and the demandant prays *seisin* of the land, and after the attorney of the tenant appears, and prays that the *essoin* be drawn, which is done, and presently he departs from the bar, and then the tenant is demanded, and no body answers for him, yet this is not any departure in despite of the Court, though the presence of the attorney be recorded, for he did not appear upon any demand of the demandant, and when he appeared, the demandant said nothing against him. 22 Ed. 3. 2. b. adjudged.]

2. In *præcipe quod reddat*, they were at issue and the parties appeared, and the *inquest* was sworn, and when the *inquest* came back to give their verdict the demandant appeared, and the tenant made default, by which the demandant prayed judgment upon the departure, and had it immediately, quod nota. Br. Departure in Despite, pl. 14. cites *Itin. Derb.* Tempore E. 3.

3. In *quare impedit*, if the defendant makes default after appearance, the plaintiff shall recover immediately his presentation and his damages; contra if he has day by continuance and after makes default, there the plaintiff shall have only distress, as appears H. 6. R. 2. Br. Departure in Despite, pl. 11. cites 2 H. 4. 1.

4. In debt the plaintiff appeared and declared, and thereupon the defendant tendered to perform his law immediately, by which the

the plaintiff departed from the bar to be nonsuited without leave of the Court, and therefore Rikhill awarded, that the defendant should perform his law, but if he had imparled to the law, he might have been nonsuited. Br. Departure in Despite, pl. 10. cites 3 H. 4. 2 & 3 H. 6. 14. accordingly.

5. In replevin the defendant justified the taking by tenure of his master, and the plaintiff pleaded jointenancy in the land, &c. and day was given over in the same term, and the defendant made default, by which the plaintiff recovered 4l. taxed by the Court, and it was said that this was no departure because they had day over, &c. scil. it was no departure in despite of the Court, and therefore it seems that it is no departure in despite of the Court unless where they appear and have imparlance to no day certain, but are demanded immediately again the same term, or the same day, and the tenant or defendant makes default, this is a departure in despite, &c. and so it appears in the common recoveries for assurances. Br. Departure in Despite, pl. 3. cites 14 H. 4. 2.

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6. If a man appears and has day over in the same term, or is demanded after without day in the same term and does not appear, but makes default, this is a departure in despite, quod nota, and so is the experience in the common recoveries for assurance of lands and tenements, where he imparles to no day certain, and makes default in the same term. Br. Departure in Despite, pl. 6. cites 27 H. 6. 39. 41.

(K. 2) Departure in Despight of the Court.

In what Cases Judgment shall be given thereon.

[1. **I**N *præcipe in capite* the tenant vouched, and the demandant imparled, and came back the same term, and the tenant made default, and upon this departure in despite the demandant recovered seisin of the land. Br. Departure in Despite, pl. 5. cites 38 E. 3. 13.

2. In *præcipe quod reddat* the tenant appeared, and pleaded bar, and the demandant replied, and the tenant was demanded at another day in the same term to have rejoined and made default, this is a departure in despight of the Court, therefore seisin of the land shall be awarded, and not petit cape; contra it is said elsewhere, if it was in another term. Br. Departure in Despite, pl. 2. cites 9 H. 6. 58.

(L) Retraxit. By whom, and in what Manner, and by what Words, one may make a Retraxit.

[1. **A** RETRAXIT is always of the part of the plaintiff or demandant. Co. 8. Beecher 59.]

[2. If

* This is misprinted and should be (7).
 [2. If the plaintiff *says he will not sue*, this is a retraxit. * 8 H. 6. 8. Brook Departure in Despight, 13. † 21 E. 4. 43.]
 Br. Departure in Despight, pl. 7. cites S. C. — Br. Default, pl. 36. cites 8 H. 6. 7. S. P. — Br. Nonsuit, pl. 20. cites 8 H. 6. 7. S. C. — See pl. 3. and the notes there.
 † Br. Departure in Despight, &c. pl. 12. cites S. C.

Br. Departure in Despight, &c. pl. 7. cites S. C. that a nonsuit shall be entered. — Br. Default, pl. 36. cites 8 H. 6. 7. S. P. — Br. Nonsuit, pl. 20. cites S. C. & S. P. — June said, that in both this and the former case it should be a retraxit; but Brooke says, that the contrary thereof seems to be law here. Br. Default, &c. pl. 36.

1 Selk. 89. [4. A retraxit cannot be, unless the plaintiff or demandant be in court in proper person. Co. 8. Beecher 58. resolved.]
 pl. 9. Hill. 2 Ann.
 B. R. Obiter. S. P. per Cur.
 The plaintiff has a verdict in debt against the defendant; after this verdict, the plaintiff's attorney non vult ulterius prosequi; and it is so entered; and judgment is given for the defendant; it * is error; for this is not a retraxit. A retraxit ought always to be by the plaintiff, in his proper person; such confession is stronger against him than a verdict. In præparatoris ad iudicium favor actori; because the law presumes, that no man will sue without a cause, and therefore a retraxit is only allowable, when the plaintiff comes in person. Jenk. 283. pl. 12. cites 8 Rep. 58. 2. 6 Jac. Beecher's case.

* [452]

5. In assise by baron and feme, Trem. prayed, that return be entered, for they were so agreed; Stouff. J. refused it, but Trench agreed, that if the baron came he should be received to extinguish his agreement during his life, and to enter the return upon him alone, but Stouff. would not assent to it, because they were plaintiffs in common, and therefore nothing was done. Br. Departure in Despight, pl. 8. cites 15 Aff. 9.

6. It seems that there is no case where a man may appear and be nonsuited all at one and the same day, but in the case where the plaintiff appears, when the jury appears, and when they come with their verdict he makes default, this shall be a nonsuit and not a retraxit, and in no other case, as it seems. Br. Departure in Despight, pl. 1. cites 3 H. 6. 14.

7. In error a man was bound to retract all suits, which he had against W. C. by such a day, &c. and said that such a day, (which was the fourth day of the term after the award made, that he should retract it) did not pursue further after this day, but suffered it to be discontinued, and per Cur. this is no retraxit; for where there shall be a retraxit he shall come into court in person, and say, that he will no further prosecute in this plea; for a nonsuit or discontinuance is no retraxit; for after nonsuit or discontinuance he may commence his suit again, but retraxit is a bar of the action. Br. Departure in Despight, pl. 9. cites 21 E. 3. 38.

8. Dower against two tenants, one of them pleaded non-tenure to the whole, the other non-tenure as to part, and in bar to the residue, upon which they were at issue; and afterwards he who pleaded in bar relicta verificatione sua confessed the action; and the demandant had judgment against him, and said, she would no further

further proceed to try the issue of non-tenure, but would enter a *retraxit*, and so it was ordered by the Court. Bendl. 177. pl. 221. Pasch. 9 Eliz. Wharton v. Butler.

9. Note, it was said by Weston and Bendloes, that a *retraxit* can not be before a declaration; which Leonard and Filmer, Prothonotaries, granted; and Dyer said, that it being before a declaration, it is but a nonsuit; and Wheatly and Filmer affirmed the same; and therefore it was adjudged, that such a *retraxit* in the Court of Hustings before the sheriff, is no plea in bar. 3 Le. 19. pl. 47. Pasch. 14 Eliz. C. B. Anon. Dal. 19. pl. 10. S. C. and S. P. accordingly.

10. The diversity is between a *retraxit* before judgment and after, for if it be a *retraxit* before judgment to one, it is a release to all; secus after judgment against one, for there *retraxit* against the others shall not serve for him against whom judgment is given. Roll. R. 233. Parker v. Sir John Lawrence, cites Green's case.

11. A *retraxit* is ever, when the demandant or plaintiff is present in court (as regularly he is ever by intendment of law, until a day be given over, unless it be when a verdict is to be given, for then he is demandable) and this is in two sorts, one *privative* and the other *positive*. *Privative*, as upon demand made, that he made default and departed in despite of the Court; and then the entry is, *et postea eodem die devenit ad barram prædicti tenens, & præd' petens tunc solenniter exactus non venit, sed a secula sua prædicta in contemptum Curiae se retraxit, ideo consideratum est, &c.* *Positive*, as when the entry is, *et super hoc idem querens dicit quod ipse non vult ulterius placitum suum prædictum prosequi, sed abinde omnino se retraxit, &c.* ideo, &c. Another form thereof is, *quod idem querens fatetur se (seu cognovit se) ulterius nolle prosequi versus prædicti defend' &c. de placito præd'.* [453]
Co. Litt. 138. b. 139. a.

(M) *Retraxit.* The Effect thereof.

[1. A RETRAXIT is a bar for ever, because it is a voluntary acknowledgment that he will not pursue further, &c. Co. 8. * Beecher 59. † 15 E. 3. Aff. 36. 3 E. 3. Itinere North 180. 21 E. 4. 39. Brook Departure in Despite, 13.] * Cro. J. 211. pl. 3. Mich. 6 Jac. B. R. Beecherv. Shisley. S. C. accordingly.

† Br. Departure in Despite, &c. pl. 13. cites S. C. — Ibid. pl. 9. S. P. cites 21 E. 4. 38. — Ibid. pl. 19. cites 21 E. 4. 43. — Br. Default, pl. 36. cites 8 H. 6. 7. S. P. said for Law. — A *retraxit* is a bar of all other actions of like or inferior nature. Co. Litt. 139. a.

2. In assise the defendant pleaded in bar a *retraxit* by the plaintiff in another assise and the tenant had day to bring in the record and failed. And therefore the plaintiff released his damages and recovered, quod nota the failer and also that a *retraxit* is a bar. Br. Assise, pl. 408. cites M. 15 E. 3.

3. In a prohibition by three, a *retraxit* of one shall not bar the others;

others; per Popham and Fenner. Mo. 460. pl. 643. Mich. 38 & 39 Eliz. Sheppard v. Metcalfe.

4. *Trespass against C. and S. they imparle at the day S. did not appear and judgment by nil dicit against him; C. pleaded in bar; plaintiff replied; C. demurred, and day given to the next term, and then the plaintiff had judgment; plaintiff entered a nolle prosequi against S. and had a writ of inquiry of damages against C. and upon return thereof adjudged against him. C. and S. brought a writ of error, because the nolle prosequi is against S. only, where judgment is entered against both C. and S. and that a retraxit against one is as strong as a release, which is a good discharge as to both, and so the judgment against C. is erroneous; and so it was adjudged, but the judgment was reversed. Cro. Eliz. 762. pl. 25. Pasch. 42 Eliz. in the Exchequer Chamber. Green v. Charnock.*

5. A writ of error lies after a confession, or retraxit; not after a disclaimer. Jenk. 283. pl. 12.

Jo. 451.
pl. 2. S. C.
and that as
to this point
the Judges
delivered
no opinion,
but that
judgment
was given
for the
plaintiff for
an omission
in the de-
fendant's plea.—

6. *A. and B. were bound in a bond jointly and severally to C. the plaintiff, C. brought debt against A. who pleaded. Afterwards C. entered a retraxit of his suit against A. and then sued B. who pleaded this matter. There were only Crooke and Berkley J. in court, and they were divided in opinion, whether this plea was good and a bar to the plaintiff, as Berkley held it was; but Crooke J. thought it no release in fact, nor in law, but quasi an agreement that he will not further prosecute, or that it is by way of estoppel only between A. and the obligee; adjournatur. Cro. C. 551. pl. 3. Trin. 15 Car. B. R. Dennis v. Payne.*

Mar. 95. pl. 163. S. C. but states it, that debt was brought against both A. and B. and Berkley and Crooke differed in opinion.

As to the Difference between a Retraxit, Nonsuit, Departure, &c.
See tit. Nonsuit. (F. 2).

[454]

(N) *What shall be said a Default.*

Fitzh. En-
quest, pl. 2.
S. P. cites
Mich. 21
K. 3. 48.

[1. **I**f a man be *essoigned of the King's service*, and does not bring his warrant at the day, which he hath by the *essoign*, this is a default at the common law. 21 E. 3. 37. 62. b. 29 E. 3. 36. adjudged. 30 E. 3. 19. b.]

2. *Præcipe quod reddat*, if a man makes attorney, and after the tenant is *essoigned* and not his attorney, this is a default, and if the tenant cannot save it, *feisin* of the land shall be awarded. Br. Default, pl. 90. cites 21 E. 3.

Br. Count,
pl. 33. cites
S. C.

3. If the plaintiff in debt appears, and will not count, it shall be awarded that he take nothing by his writ. Br. Default, pl. 13. cites 2 H. 4. 15.

Br. Garra-
tie de Attor-
ney pl. 11.
cites 14 H.
4. 16.

4. Where the tenant in *præcipe quod reddat* appears at the *nisi prius* by attorney who has no warrant, this shall turn him in default at the day in Bank, though the jury be taken and pass for the demandant. Br. Default, pl. 26. cites 14 H. 4. 16.

5. *Præcipe*

5. *Præcipe quod reddat* against baron and feme, *protection quia profecturus* was cast for the baron, and immediately *innotescimus* was cast, by which the protection was annulled. And by all the Justices this was a default of the tenants, quod nota. Br. Default, pl. 55. cites 1 H. 6. 6.

6. Where protection is cast for the garnishee at the day of *nisi prius*, and is repealed at the day in Bank, yet this shall not turn the party in default, because it was allowable at the first day. Br. Default, pl. 44. cites 4 H. 6. 9. Br. Protection, pl. 39. (bis) cites S. C.

7. A man was bound in a recognizance to have J. N. in the Chancery such a day, and in *scire facias* he said that he had him there that day, and because his appearance was not entered of record, therefore no plea; per Cott. Ball. June and Froy. *Quære*. Br. Default, pl. 32. cites 7 H. 6. 26.

8. And if a man be returned in issues upon distress and appears, and his appearance is not of record; he shall not save his issues, quod nota. Ibid.

9. If one is bound to appear in B. R. at Westminster such a day to answer, &c. though the term is adjourned to H. yet he ought to appear in B. R. or otherwise he shall forfeit his bond; per Cur. cites 9 E. 4. and says, that so are diverse precedents. Cro. E. 466. pl. 16. Hill. 38 Eliz. B. R. Corbet v. Cook. Mn. 430. pl. 601. Hill. 38 Eliz. Corbet v. Downing, S. P. that

by appearing at H. the party has not forfeited his obligation, but makes a quære if he had not appeared there, but at Westminster, whether he had forfeited it. Popham seemed that the word (Westminster) in the condition, would make the obligation void by the statute of 23 H. 6. because there is not any such name in the writ for appearance.

* See Pl. C. 68. a. b.

(N. 2) What shall be such a Default, on which Judgment shall be given.

1. *In præcipe quod reddat* the tenant vouched two, and by the nonage of the one prayed that the parol demur, and the demandant said that he was of full age, and prayed that he might be viewed in court, by which process issued till the sequatur, and he did not come, nor any writ returned, by which the demandant recovered seisin of the land. Br. Ven. Fac. pl. 6. cites 45 E. 3. 23. [455]

2. Where a man says that he will not appear, the plaintiff cannot recover *quia nihil dicit*; for this appearance was not to the action, but to shew that he would not appear, and if he had not appeared to the action, the plaintiff could not declare, and without declaration the defendant shall not be condemned *quia nihil dicit*; for he is not bound to answer to the writ, but to the declaration, quod nota, and declaration cannot be made; for he has not appeared to the action. Br. Default, pl. 36. cites 8 H. 6. 7.

3. In debt if the plaintiff alleges that the defendant is in the Fleet, and prays that the warden bring him in, who does so, and says that he is the same person, and that he will not appear, he shall be condemned; per June, quod omnes concesserunt. Ibid.—But contra Br. Confession, pl. 16, cites S. C.

contra 2 H. 5. and contra in the case of COLR, because he was prisoner to another court.

(O) In what Cases the Default of the one shall be the Default of the other. Baron and Feme.
[Corporations] pl. 12. 13.

* Br. Baron and Feme, pl. 38. cites S.C.—S.P. [1. **W**HERE the baron is to have a *corporal punishment* for the default, there the default of the feme shall not be the default of the baron. * 11 H. 4. 72. † 9 H. 6. 8.]

pet Brook.
Br. Default, pl. 53. cites 14 H. 6. 14.

† Br. Baron and Feme, pl. 5. cites S.C.—Br. Process, pl. 8. cites S.C.—Fitz. Process, pl. 84. cites S.C.

Br. Baron and Feme, pl. 1. cites 3 H. 6. 19. [2. *As if at the pluries capias the baron appears, and the feme makes default, this shall not be the default of the baron for the corporal punishment.* * 11 H. 4. 72. Contra † 3 H. 6. 19.]

contra, that *exigent shall issue against both*, for the feme is amefnable by the baron, and so the default of the baron, that the feme had not come; per Martin, quod non negatur.—And S. P. Br. Baron and Feme, pl. 53. cites 9 E. 4. 23. Per Choke and Danby. Brook says, quod mirum, where corporal punishment shall be as here.

* Br. Baron and Feme, pl. 38. cites S.C.

† Br. Baron and Feme, pl. 1. cites S.C.

* Fitzh. Default, pl. 21. cites S.C. [3. *So upon the capias if the baron makes default, and the feme appears, this shall not be the default of the feme.* * 12 H. 4. 1. Placito 1. † 3 H. 6. 19.]

† Br. Baron and Feme, pl. 1. cites S.C. that *exigi facias issued against baron, and idem dies given to the feme.*—Br. Process, pl. 6. cites S.C.—Fitzh. Process, pl. 65. cites S.C.

And therefore he went fine [4. *At the exigent returned against the baron and feme, if the baron appears, and the feme makes default, this shall not be the default of the baron for the corporal punishment.* 9 H. 6. 8. b. * 44 E. 3. 1. b. adjudged. † 39 E. 3. 18. b. adjudged.]

the plaintiff prayed, that he might remain in prison. Br. Baron and Feme, pl. 37. cites 11 H. 4. 54.—Br. Default, pl. 84. cites S.C. but contra in trespass.—But he shall answer alone. Br. Baron and Feme, pl. 47. cites 21 H. 6. 4.—Br. Responder, pl. 19. cites S.C.

* Br. Baron and Feme, pl. 76. cites S.C. but the feme was waived.—Ibid. pl. 18. cites S.C.

† Br. Responder, pl. 26. cites S.C. that the baron came ready to answer, and because the exigent was ill against the feme, it was discontinued, and *exigent de novo* was awarded against her, and * the baron was awarded to answer. Finch said, that the action being against the baron and feme, she cannot plead without the baron, and therefore he shall answer again with his feme; and after he answered, and idem dies given him to the return of the exigent, to answer for the feme.—Br. Baron and Feme, pl. 87. cites S.C.

*[456]

[5. *So if upon the exigent the baron and feme have a super-fedeas, and notwithstanding this they are returned outlawed, and at the return the baron appears, and the feme makes default, this shall not be the default of the baron for the corporal punishment.* † 9 H. 6. 8.]

† Br. Baron and Feme, pl. 5. cites S.C. by which exigent de novo issued against the feme, and the baron had idem dies. And if the baron makes default at the day, &c. Distringas shall issue against him.—Br. Barre, pl. 6. cites S.C.—Br. Process, pl. 8. cites S.C.—Fitzh. Process, pl. 84. cites S.C.

[6. But

[6. But otherwise it is where the baron is not to have any corporal punishment by the default. 11 H. 4. 72.] Br. Baron and Feme, pl. 38. cites S. C. — Ibid. pl. 65. cites S. C. — Fitzh. Default, pl. 10. cites S. C.

[7. As in a plea of land if the baron appears, and the feme makes default, a grand cape shall issue of the whole. * 11 H. 4. 72. † 28 E. 3. 91. b. adjudged.] * Br. Baron and Feme, pl. 38. cites S. C. — Fitzh. Default, pl. 10. cites S. C.

† Fitzh. Grand Cape, pl. 21. cites S. C.

8. So if issues be returned against baron and feme, the default of the feme is of both. * 11 H. 4. 72. 12 H. 4. 1. Placito 1. † 14 H. 6. 14.] S. P. Br. Baron and Feme, pl. 75. cites 43 E. 3. 18.

* Br. Baron and Feme, pl. 38. cites S. C. — Fitzh. Default, pl. 10. cites S. C.

† Br. Default, pl. 32. cites S. C.

[9. So if baron and feme are attached in a trespass, the default of the feme is the default of both, and so the issues forfeited. * 11 H. 6. 14. Contra † 22 Aff. 46. adjudged.] * Br. Default, pl. 52. cites S. C. — † In trespass, if the

baron and feme are defendants, and the baron comes and the feme not, he shall be received to answer alone, but if she comes, and the baron not, she shall not be received to answer, till her baron comes, or be outlawed. Br. Default, pl. 61. cites 28 Aff. 46. — Br. Responder, &c. pl. 32. cites S. C. — Fitzh. Responder, pl. 40. cites S. C.

[10. If aid be granted of baron and feme in reversion, the default of the baron shall not be of both. 21 E. 3. 13. adjudged.]

[11. In an assise the default of the feme shall be the default of the baron. 29 Aff. 67.] Fitzh. Assise, pl. 293. cites S. C.

[12. In a quod permittat against bailiff and commonalty, the default of the commonalty shall be the default of the bailiff at the grand distress; for both are but one corporation, and so one defendant. 29 E. 3. 40. admitted.]

[13. So where there are two bailiffs and one commonalty, the default of one bailiff shall be the default of all. 30 E. 3. 1.]

14. In præcipe quod reddat, against baron and feme, the baron is essoigned de servicio regis and at the day did not bring his warrant, but the feme was essoigned de servitio regis without warranting the essoign of the baron, and well; for she shall not warrant it. Br. Default, pl. 99. cites 30 E. 3. 19. and Fitz. Essoign. 7.

15. And if the baron had appeared and had not warranted the essoign, he had lost the land, but by his default and the essoign of the feme, the land is saved, and so the default more profitable than the appearance, as here, quod nota bene. Ibid. [457] Br. Default, pl. 74. cites S. C.

16. Feme was received in default of her baron and after made default, and judgment was given upon the default of the baron. Br. Default, pl. 85. cites 38 E. 3. 12. and now no mention shall be made of the receipt as it is said in the time of H. 8.

17. Dower against baron and feme who made default, and grand cape issued, and at the day the baron came, and the feme not, and he said, that he is tenant of the whole, absque hoc, that the feme any thing has, ready to answer, and because the default of the feme

pl. 11. cites
S. C.

is the default of the baron and feme, therefore the demandant recovered seisin of the land, quod nota. Br. Default, pl. 5. cites 41 E. 3. 24. in the Old Book.

Br. Baron
and Feme,
pl. 73. cites
S. C.—S. P.
and if it was
in præcipe
quod reddat
grand cape
shall issue
against the
feme. Br.
Exigent, pl.
42. cites
S. C.

18. *Detinue against the baron and feme, the feme was waived, and the baron appeared at the exigent, and the plaintiff counted of a bailment to the feme dum sola fuit, and therefore because the process is determined, and this is of the act of the feme to which he cannot answer without her, therefore by award, the baron went fine die; for as to losing issues, &c. upon distress returned against baron and feme, the default of the feme is the default of the baron and feme; contra in case of capias and exigent, &c. which are corporal punishments, quod nota. Br. Default, pl. 7. cites 43 E. 3. 18. & 44 E. 3. 1. & 34 H. 6. concordat.*

19. *Appeal of mayhem against baron and feme after the exigent awarded, the baron rendered himself, and found mainprise, and had superfedas notwithstanding the feme did not come. Br. Baron and Feme, pl. 33. cites 8 H. 4. 6.*

20. In *præcipe quod reddat* against baron and feme, the default of one is the default of both; for one cannot answer without the other. This no inconvenience to the wife; for upon default, after default of the husband, she may be received to defend her right. Jenk. 27. in pl. 50. cites 26 H. 6. Default 4.

Br. Baron
and Feme,
pl. 73. cites
S. C.

21. In *forcible entry and in trespass* against baron and feme, if the baron appears at the pluries capias, and the feme not, the baron shall answer alone, and the reason is, *where the entry is supposed to be by both, then he shall answer alone; but contra where the entry is supposed by the feme dum sola fuit; for in this case, the default of the feme shall not be the default of the baron and feme, contra, where the entry is supposed by both, there the default of the feme is the default of the baron and feme, and so he shall answer alone; and in debt against baron and feme it shall be intended the debt of the feme, and so if the baron appears, and the feme is waived at the exigent against both, the baron shall go without mainprise. Br. Responder, pl. 29. cites 36 H. 6. 1.*

22. In *debt the default of the feme, where the baron appears is the default of both, and capias shall issue against both; per Choke and Danby, quod mirum where there shall be corporal pain. Br. Default, pl. 47. cites 9 E. 4. 23.*

Where the default of the baron shall be the default of the feme, so that the one shall not answer without the other.
See tit. Baron and Feme. (1. a.)

[458] (O. 2) Default of one (not Baron and Feme,) where it shall be the Default of another.

1. **A**SSISE against two tenants in common, the one appeared and the other made default, and he who appeared was suffered to plead for the whole, but in such a case *Semper* awarded the

the assise by default for the moiety. Br. Default, pl. 89. cites 9 Aff. 16.

2. *Debt against two who waged their law*, and at the day the one makes default, this is the default of both; and the plaintiff shall recover, but if he suffers the one to wage his law, he shall take nothing by his writ. Br. Default, pl. 96. cites 40 E. 3. 35.

3. *Two were outlawed in debt at the suit of two*, and the one purchased charter of pardon, and *scire facias* against the plaintiffs, and the one was returned warned and did not come, and the other was returned nihil, and the defendant would have gone quit by the default of him who was warned, because the default of the one plaintiff in action of debt, is the nonsuit of both; Tamen quære as here, where the action is against them, by which he had sicut alias against the other, and at the day if both the plaintiffs appear, and this defendant only without his companion, the plaintiff shall not count against him, till the other has sued his charter, and appeared likewise, for they were impleaded jointly. Br. Default, pl. 12. cites 48 E. 3. 3.

B. Scire
Facias, pl.
46. cites
S. C.

4. *When two are to recover a personal thing*, there the default of one, is the default of both; but when they are to discharge themselves of a personalty, it is otherwise. 6 Rep. 25. b. Per Cur. cites this diversity taken, and agreed in 2 H. 4. 16. a. b.

5. *Scire facias by three, two were effoined*, and the *effoin* was quashed per Cur. because delays are ousted in scire facias by the statute of Westminster 2. cap. 45. Quia de hiis que recorlat sunt, &c. and *scire facias ad frequend' simul* against the two, and the one of the tenants made default, and his default was recorded, and day given over. Br. Effoine, pl. 120. cites 10 H. 6. 1.

6. A man recovered debt, and the defendant was committed to prison for execution thereof, and after the plaintiff made three executors and died, and the one executor released to the defendant, by which scire facias issued against the three executors to dismiss the defendant, and they were returned warned, and two appeared, and he who made the release made default, and the two pleaded that the third ne releffa pas by the deed; and the best opinion was, that the default of the third is peremptory, and that the prisoner shall be delivered; quære. Br. Scire Facias, pl. 232. cites 10 H. 6. 2.

7. In debt against two executors, and they are at issue, and after one makes default, yet the inquest shall not be taken by default against the other, quære if it was not as executor. Br. Default, pl. 86. cites 21 H. 6. 45.

8. If a man is bound to two in a statute staple, and the one releases and both sue execution, the defendant brings audita querela against both, and the one comes and the other not, the default of the one is the default of both, and by this the consor shall go quite discharged against both. Br. Default, pl. 94. cites 11 E. 4. 8.

9. In præcipe quod reddat against two, if they imparle jointly, and after the one makes default, this is the default of both, per Davers; but Brian & Kebil contra. Br. Default, pl. 65. cites 4 H. 7. 17.

Default.

10. But in debt against two the default of the one, after joint imparlance, is the default of both. Ibid.

11. Where a grand cape is awarded against two tenants of full age, and the one excuses himself by a flood of water, and the other says nothing, the writ shall abate against him that excused himself, and shall stand good against the other; per Frowike. Keilw. 51. and b. pl. 2. Trin. 19 H. 7.

Br. Default,
pl. 53. cites
S. C.—
Br. Execu-
tors, pl. 94.
cites S. C.

12. In writ of entry, two executors came and prayed to be received to save their term by default of the tenant, by the statute of Gloucester, and after the one relinquished the receipt and made default, and per Rede Ch. J. this shall not be the default of both; for that which is most beneficial for the testator shall be taken; for where they plead two pleas, the plea which is most beneficial shall be taken and first tried, and if they plead release, and the one makes default after, the other shall be permitted to prosecute for the advantage of the testator. Per Kingsmill, J. after they have joined in plea the default of the one is the default of both. But the saying of Rede seems to be law, and he who relinquished would have surrendered and was not suffered; for the Court has no warrant but to record his default, the reason seems to be inasmuch as he is not party to the original. Br. Resceit, pl. 59. cites 21 H. 7. 25.

13. An information was brought against 6 for an assault; they all plead, not guilty. Upon the trial all but one make default. The Court held, that the default of the rest shall not bind him; for though they joined in the plea of not guilty, yet being in a criminal case, it is quasi several pleas; and the default of one shall not be the default of others; and the inquest was taken by default only against those that did not appear. Cro. C. 251. pl. 1. Pasch. 8 Car. B. R. The King v. Wingfield & al'.

(P) Of the Plaintiffs.

* Br. De-
fault, pl. 14.
cites S. C.
and Bailee
prayed gar-
nishment
against the
three obli-
gors, and
had it, and

[1. IF two obligees sue one bailee of the obligation, if one of the plaintiffs makes default, this is the default of both. 2 H. 4. 16.]

[2. But if divers obligors are warned, and one makes default, this is not the default of all, although upon the matter all are plaintiffs, for they claim not a duty, but a discharge. * 2 H. 4. 16. 3 H. 4. 7. b.]

at the day they were returned warned, and two came, and the third made default, and there it was awarded, that the default of the one shall not condemn his companions.—For in debt upon the same obligation against the three, the default or plea of the one, shall not charge the other; but ex altera parte the nonsuit or release of one of the plaintiffs shall prejudice the other. Br. Ibid.—But if the three obligors had brought writ of detinue of the obligation and defendant had had garnishment against the obligees; and the one of them had made default, quære, if the other two shall be received to enter-plead; for the two obligors above were received to enter-plead. Br. Ibid.—Fitzh. Entes-Pleader, pl. 12. cites S. C.

Br. Process,
pl. 79. cites
9 E. 4. 2.

3. Two brought præcipe quod reddat against N. the tenant, and the one of the demandants made default, and summons ad sequendum simul

sum was awarded, and grand cape of the whole; for if the other demandant will appear, then they shall recover the whole upon the default of the tenant, and if not, then only the moiety for the one demandant. Br. Default, pl. 46. cites 4 H. 6. 28.

* 4. If a man is outlawed in debt, and the defendant purchases charter of pardon and scire facias against the plaintiff, and he makes default, this is peremptory, and the defendant shall go quit. Br. Default, pl. 87. cites 22 H. 6. 7.

5. Surety of the peace was taken against E. B. who had day by mainprise Menfe Paschæ, and did not appear at the day, there his mainpernors have forfeited the bond, though J. N. who took the peace, did not appear at the day and demand the said E. B. and yet scire facias was awarded to answer the sum. Br. Default, pl. 60. cites 39 H. 6. 26.

6. But where a man is taken by *capias* at the suit of J. N. and is bound with mainpernors to appear such a day, and neither he or the plaintiff appears, there the defendant or his mainpernors shall forfeit nothing, because the plaintiff did not appear; quod fuit concessum, but it was said that the cases are not alike. Ibid.

(P. 2) Excused or discharged. By what.

1. **A** MAN recovered by default against an infant, and the infant brought writ of error, and reversed it for his nonage; and contra if he had appeared and lost by plea or by voucher, he shall not reverse it by nonage. Br. Saver Default, pl. 50. cites 6 H. 8. B. R. 22. and concord. 7 E. 3.

2. A man is bound, and mainpernors with him, to appear at Westminster in B. Oñ. Mich. and at the day he does not appear, but protection is cast for him, this saves his default, and the bond shall not be forfeited; per tot. Cur. Quod nota bene. Br. Saver Default, pl. 39. cites 11 H. 4. 57.

3. Note by award of Babbington Ch. J. that in *præcipe quod reddat* at the grand cape the tenant appears, and the demandant counted; by this the default is released, and the tenant need not save the default. Br. Saver Default, pl. 41. cites 8 H. 6. 3.

4. The demandant may release the default against the will of the tenant, per Fitzh. and Shelly; but per Fitzh. if the tenant had tendered his law by attorney, the demandant cannot release the default without the will of the tenant, by many books, as it is said, *quare inde*. Br. Saver Default, pl. 1. cites 27 H. 6. 13. *Præcipe quod reddat at the grand cape, the tenant waived his law of non summons, and at the day the demandant would have waived the default, and could not, per Cur. without the assent of the tenant, and the tenant would not, but did it, and therefore the writ was abated; quod nota; and the reason seems to be inasmuch as there is an issue tendered which ought to be tried; for before this he might have released the default.* Br. Saver Default, pl. 13, cites 41 E. 3. 7. [But seems mislited.]

5. The best opinion was, that infirmity, or a fall from a horse in a journey, that he was in danger of death of the hurt is not sufficient cause to save default, but in *præcipe quod reddat*, but imprisonment and inundation of water are good causes to save default; *Malady is good excuse against outlawry, quare legem, and*

if the same
law be to
save default
in præcipe
quod red-
dat, it seems

that it is not: for malady may be feigned; *contra* of floods of water, and imprisonment, and *nonage*. Br. Saver Default, pl. 45. cites 4 H. 6. & Fitz. Challenge, 153.—Co. Litt. 199. b. S. P.—S. P. that malady was pleaded in avoidance of outlawry and accepted 4 H. 4. thereto, quære, if it be cause to save default in plea of land. Ibid. pl. 48. cites the printed book of Abridgment of Ass. fol. 48.

[461] 6. *Præcipe quod reddat*, at the *nisi prius* the tenant and his attorney made default, and the default recorded, and at the day in bank the tenant came and had his presence recorded for all the term, and he pleaded that he and his attorney had only three days notice before the *Nisi Prius*, and shewed where this was held in the county of York, and the distance, and that he and his attorney were searching for their evidences to have come at the *Nisi Prius* and were hindered by water in the county of Durham. See the pleading there at large, good matter, pleaded by a prothonotary; for Chocke and Littleton, serjeants of the tenant, refused to plead for him, because it was suspicious, and the demandant demurred upon the plea, and it was much debated if it should serve or not; and it was admitted that his plea goes as well to the attorney, and for him, as for the tenant; but it was said that this shall not serve the attorney because he refused to plead it; and this was, because the Court did not favour the matter for the suspicion; and this per Billing and Laicon serjeants for the demandant. Br. Saver Default, pl. 29. cites 38 H. 6. 31.

7. *Præcipe quod reddat* against four, who made default at the day of the grand cape, two appeared in person and tendered their law of non-summons, and the other two by attorney tendered their law of non-summons, and the demandant released the default of the two who appeared in person, and would have advantage of the default of the other two. And per Dandby Ch. J. and several others, the release of the default of one, is so of all, for the sum is intire; for one jointenant in action against several cannot be summoned, but it is the summons of all. Br. Saver Default, pl. 32. cites 3 E. 4. 21.

8. There be divers causes allowed by law for saving a man's default; at first by imprisonment, whereof Littleton here speaks. 2dly, Per undationem aquarum. 3dly, Per tempestatem. 4thly, Per pontem fractum. 5thly, Per navigium substractum, per fraudem petentis; non enim debet quis se periculis & infortunis gratis exponere, vel subicere. 6thly, Per minorem etatem. 7thly, Per defensionem [defaultam vel omissionem] summonis per legem. 8thly, Per mortem attornati, si tenens in tempore non novit. 9thly, Si petens esseniatus sit. 10thly, Si placitum mittatur sine die. 11thly, Per breve de warrantia diei. Co. Litt. 259. b.

(P. 3.) Declaration; necessary in what Cases, notwithstanding the Default of the Defendant.

1. **A**T the grand cape in *præcipe quod reddat*, if the tenant wages his law of non-summons, there at the day the demandant cannot release the default and count against the tenant. *Contra* at the first day, as it is said elsewhere. Br. Default, pl. 96. (his) cites 42 E. 3. 8.

2. *Cessavit* against an infant who made default at the summons, and after came at the grand cape, and was not compelled to save his default, by reason of the infancy; but the demandant counted against him without taking him at the default; for otherwise his writ shall abate; for an infant shall not save his default; for he cannot gage his law of non-summons. Br. Saver Default, pl. 51. cites 3 H. 6, 10.

3. So it seems of coverture. Ibid.

4. In *scire facias*, where the assize is taken by default, yet the plaintiff shall make his plaint. Br. Default, pl. 56. cites 38 H. 6. 18.

5. So in *dower* by default the plaintiff shall make his demand; [462] for these writs do not comprehend certainty. Ibid.

6. *Contra* in *præcipe quod reddat*; for there appears certainty, note the difference. Ibid.

(P. 4.) Pleadings to the Writ after Default.

1. **I**N *attaint* if the defendant makes default, he cannot plead to the writ afterwards. Thel. Dig. 210. Lib. 14. cap. 16. S. 1. cites 12 E. 1. Attaint 71. Ut dicitur.

2. Nor at the return of the writ. Ibid. cites 12 Ass. 2.

3. In writ of entry after it was pleaded to the inquest, the tenant made default, and at the day of petit cape returned he was *essoigned de servitio regis*, and at the day failed of his warranty, and afterwards he would have pleaded that he was villein to such a one, and held in villeinage, &c. and was not received, but seisin was awarded. Thel. Dig. 210. Lib. 14. cap. 16. S. 2. cites Pasch. 32 E. 1. Saver Default, 83.

4. In writ against baron and feme the baron appeared at all times, and the feme made default after default, upon which the baron was received to say that his feme was *essoigned by the demandant*. Thel. Dig. 210. Lib. 14. cap. 16. S. 3. cites Pasch. 16 E. 2. Saver Default, 77. and says see 10 E. 3. 522. and Pasch. 11 E. 3. Vifne, 59.

5. In *formedon* by two parceners the one was summoned and severed, and the tenant after made default after appearance, and at the day of the petit cape returned, he was received to plead the death of him who was severed after the severance without

saving his default. Thel. Dig. 210. Lib. 14. cap. 16. S. 5. cites Hill. 5 E. 3. 174.

6. At the *grand cape* against a prior he said, that the priory is a cell to such an abbey, and that he is commoign to the abbot, and so the franktenement in the abbot, &c. Sed non allocatur. Thel. Dig. 210. Lib. 14. cap. 16. S. 6. cites Hill. 5 E. 3. Saver Default, 64.

7. In writ against two, if the one appears, and the other makes default, and the *grand cape* of the moiety returned, if he make default at another time, the one may take the intire tenancy and plead. Thel. Dig. 211. Lib. 14. cap. 16. S. 34. cites Mich. 5 E. 3. 209.

8. After the tenant has failed of his warranty of *essoign de servitio regis*, he may shew how the process is discontinued against him. Thel. Dig. 210. Lib. 14. cap. 26. S. 10. cites Trin. 18 E. 3. Eppoign, 59.

9. In dower at the *grand cape* returned, the tenant was received to say that the demandant after default made, has received certain tenements in allowance of her dower without saving his default. Thel. Dig. 210. Lib. 14. cap. 16. S. 11. cites Trin. 13 E. 3. Saver Default, 36.

10. At the *petit cape* returned against an infant he was *essoigned de servitio regis*, and at the day given he failed of his warranty, and would have pleaded by guardian, that he was within age and that the demandant disseised him, &c. and was not received. Thel. Dig. 210. Lib. 14. cap. 16. S. 12. cites Trin. 14 E. 3. Saver Default, 40.

11. At the *petit cape* returned against two, each of them severally took the intire tenancy, and alleged imprisonment to save their defaults severally, upon which the demandant was compelled to maintain his writ. Thel. Dig. 210. Lib. 14. cap. 16. S. 14. cites Trin. 18 E. 3. 27.

[463] 12. At the *grand cape* returned against the baron and feme, the feme came and was received to shew discontinuance of process, inasmuch as the *grand cape* was only of the moiety, without being received to defend his right. Thel. Dig. 210. Lib. 14. cap. 16. S. 15. cites Mich. 20 E. 3. Discontinuance, 8. and says, see Trin. 24 E. 3. 20.

13. At the *grand cape* returned executed against the baron and feme, the baron was not received to say that his feme was dead the day of the writ purchased without saving his default, because the writ was served. Thel. Dig. 210. Lib. 14. cap. 16. S. 17. cites Mich. 26 E. 3. 68.

14. It is said that at the *petit cape ad valentiam* the vouches shall not say that the tenant is dead without saving his default. Thel. Dig. 211. Lib. 14. cap. 16. S. 33. cites Mich. 27 E. 3. 88. Quære.

15. At the day given to make his law of non-summons, the tenant was *essoigned*, and at the day given by the *essoign* he would have pleaded that the demandant had taken baron after the *lay-gager*, without making his law and was not received. Thel. Dig.

Dig. 210. Lib. 14. cap. 16. S. 19. cites Hill. 38 E. 3. 7. & 20 H. 6. 2.

16. It is adjudged that at the *grand cape* returned against several, each of them may take several tenancy of parcel, and wage law of non-summons severally, and the demandant shall maintain his writ, otherwise it shall abate. Thel. Dig. 210. Lib. 14. cap. 16. S. 20. cites Mich. 38 E. 3. 33.

17. At the *petit cape* returned, the tenant cannot say that the demandant has taken baron after the last continuance, but he shall plead profession in the demandant; for this extinguishes right. Thel. Dig. 210. Lib. 14. cap. 16. S. 21. cites Trin. 39 E. 3. 20.

18. At the *grand cape*, the tenant was received to plead misnomer of himself. Thel. Dig. 211. Lib. 14. cap. 16. S. 23. cites Hill. 40 E. 3. 1.—In his surname and in name of baptism, Ibid. S. 23. cites 40 E. 3. 46.—And misprision apparent of his name in the writ. Ibid. cites 42 E. 3. 3.

19. After *ley-gager* of non-summons by several tenants in common, the one of them cannot take the intire tenancy. Thel. Dig. 211. Lib. 14. cap. 16. S. 25. cites Mich. 40 E. 3. 40. & Hill. 41 E. 3. 2. and says see 42 E. 3. 16. & Hill. 8 H. 6. 37. Quære.

20. At the *grand cape* the tenant shall plead several tenancy, and jointenancy, with *ley-gager* of non-summons, but not non-tenure. Thel. 211. Lib. 14. cap. 16. S. 32. cites Trin. 33 H. 6. 24. & Pasch. 12 E. 41.

(Q) In what Cases the *Inquest* shall be taken by Default. [And in what, Process shall issue.]

1. **I**N such actions which descend in the realty, if the parties plead to issue, the inquest cannot be taken by default upon default of the defendant, but a distringas shall issue in lieu of a *petit cape*. 30 E. 3. 29.]

No inquest in any action real can be taken by default. a Inst. 127.

[2. As in a writ of customs and services, the inquest ought not to be taken by default, for this is to affirm the seigniori. 30 E. 3. 29.]

[3. So in a writ of mesne, if the seigniori be denied, 30 E. 3. 29. will prove it.]

[4. In a *præcipe quod reddat*, if after the *petit cape* the tenant pleads imprisonment in another county, scilicet, in Middlesex, upon which they are at issue in Middlesex, and there tried against the tenant, and he brings an attaint in Middlesex, and the sheriff returns that he hath nothing to be summoned by, the inquest shall not be taken by his default, but a writ shall issue to the county where the land is. 42 Ass. 14. adjudged.]

Br. Process, pl. 104. cites S. C.—Br. Attaint, pl. 81. cites S. C.

[5. If an attaint had been brought at the common law against the *petit jury*, and they had been returned attached and yet had made default, yet the inquest should not be taken by default, but process should be awarded.]

[6. So

* Fol. 586.

+ Br. At-
taint, pl. 5.
cites S. C.—
Fitzh. At-
taint, pl. 5.
cites S. C.

[6. So at common law, in this case if some of the jurors had appeared, and others had made default, yet the inquest should not be taken by default, but process should have been awarded till all had appeared (*) + 27 H. 6. 8. b. And so is the statute de attinctis of 13 E. 2. but this is now aided by the † statute upon the grand distress returned. 21 H. 6. 42.]
‡ 23 H. 8. cap. 23.

7. In annuity, the defendant said, that at the time of the gift made he was within age, and upon this they were at issue, and at the day the inquest appeared, the defendant made default, by which the inquest was taken by default, which see in the addition of the writ of venire facias, in natura brevium, 172, P. E. 3. Br. Inquest, pl. 91. cites 7 E. 3.

8. In meridancehor, if at the summons the tenant is effaigned and after makes default, re-summons shall issue, and not attine by default. Br. Default, pl. 88. cites 8 Aff. 13.

In quid iuris
clamatur
the inquest
was taken
by default,
by which
the de-

9. In quod iuris clamatur, the defendant claimed fee, and upon this they were at issue, and venire facias issued, returnable, &c. at which day the attorney of the defendant was effaigned, and the effains quashed, and therefore the inquest shall be taken by his default. Br. Enquest, pl. 22. cites 10 E. 3.

defendant was not permitted to challenge or lay any thing in evidence. Br. General Issue, pl. 86. cites 10 E. 3. and Fitzh. tit. Inquest, 47.

Br. Inquest, pl. 76. cites 10 E. 3. 3a. and Fitzh. Inquest, 46.—Br. Challenge, pl. 214. cites S. C. But Brooke makes a wonder of the evidence, because the contrary thereof is now used. S. P. Br. Inquest, pl. 10. cites 2 H. 4. 14. and 28 Aff. 4a.

10. In ward, the parol was fine. die by protection, and excoived by re-summons, and the sheriff returned the defendant nihil, and yet the plaintiff cannot have the inquest by default. Br. Inquest, pl. 96. cites 14 E. 3. and Fitzh. Inquest, 9.

Br. Inquest,
pl. 28. cites
S. C. ac-
cordingly.
because in
case of se-
lony.—

11. In an appeal of rape the defendant pleaded not guilty, he was let go by mainprize, and made default at the day of trial, as inquest shall not be taken by default in favorem vite, but a capias shall issue, and an alias &c pluries, and an exigent. Jenk. 68. pl. 30. cites 16 Aff. pl. 13.

Br. Appeal, pl. 54. cites S. C.—Br. Exigent, pl. 67. cites S. C.—Br. Process, pl. 148. cites S. C.—Br. Waiver de Chofes, pl. 39. cites S. C.

1 Salk. 217. S. P. by Holt, Ch. J. Obiter, cites Jenk. 68. and * 18 Aff. 13. and 24 H. 6. 14.

* This was an indictment for receiving one A. a clerk attainted, and he pleaded not guilty; but the Justices would not take the inquest, because the clerk might make his purgation after the other was hanged.

But in writ
of waste
if the de-
fendant
makes de-
fault at the

12. In waste, at the venire facias returned, the defendant made default, and the plaintiff prayed the inquest by his default, and could not have it, but had distringas ad audiendum iuramentum. Br. Inquest, pl. 94. cites 18 E. 3. and Fitzh. Inquest, 3.

Nisi Prius, the inquest shall be taken by his default. 30 E. 3. quod nota, in a mixed action. Br. Enquest, pl. 55. cites 22 H. 6. 4.

13. In *scire facias* after issue, the defendant made default at the first day, distress shall issue ad audiendum jurat, but if he makes default at the second day, the inquest shall be taken by his default, Br. Inquest, pl. 71. cites 20 E. 3. and Fitzh. Inquest, 11.

* 14. Debt against C. who pleaded *nihil debet*, and at the venire facias the defendant was effaigned, and at the day was effaigned de servitio regis, and at the day did not bring his warranty thereof, and the plaintiff prayed the inquest by default, where the statute gives 40s. for the journey, and could have only 40s. damages for the delay, and the defendant was amerced, and *Nisi Prius* awarded. Br. Default, pl. 31. cites 21 E. 3. 37.

15. Where assise is awarded against a man by his default, yet he shall have the challenges. Br. Challenge, pl. 113. cites 22 Ass. 26. Per Hussey.

16. In *attaint* where the grand jury is awarded against the petit jury by default, there by their default they have lost their challenge to the 24, quod nota. Br. Challenge, pl. 114. cites 22 Ass. 31.

Brooke says, it is said elsewhere, that he may give evidence.

17. Action of land against the baron and feme, and J. S. and at the *Nisi Prius* J. S. appeared by attorney, and the baron and feme made default, and the demandant prayed the inquest of the moiety, and could not have it. The reason seems to be inasmuch as upon the default recorded petit cape shall issue of the moiety at the day in bank. Br. Inquest, pl. 62. cites 28 E. 3. 27.

18. *Scire Facias* by two coparceners, the one made default at the *Nisi Prius*. Per Filmer, if in suit against two tenants, the one makes default at the *Nisi Prius*, yet the inquest shall be taken; and the justices would have taken the inquest, but it remained for default of jurors. Br. Inquest, pl. 69. cites 32 E. 3. and Fitz. Inquest, 6.

the inquest; for if he can save the default at the petit cape, all the writ shall abate, or if the demandant releases the default, all the writ shall abate; which Babbington Ch. J. agreed. Br. Inquest, pl. 78. cites 12 H. 6. 7. and Fitz. Inquest, 56.

19. In waste, if the defendant makes default after appearance, the plaintiff shall have distress infinite, and not writ to inquire of the waste. Br. Default, pl. 82. cites 7 H. 4. 15.

20. If the prisoner in aid makes default at the day of *Nisi Prius*, the inquest shall be taken immediately. Br. Default, pl. 98. cites 7 H. 4. 21.

21. If *Nisi Prius* ceases by protection, and at the day in bank is repealed, new process shall be made against the jury, but if it be disallowed at the day, the inquest shall be taken by his default. Br. Process, pl. 170. cites 14 H. 4. 16.

At the *Nisi Prius* in plea personal protection was shown for the defendant, and at the day in bank which the defendant showed repellant, which was allowed, and yet the inquest not awarded by default of the defendant at the *Nisi Prius*; for the protection was then in force, and yet the day of *Nisi Prius*, and the day in bank is all one in diverse respects, by which they demanded the defendant, and he made default, wherefore then the inquest was awarded by default. But where protection is shown forth at the day of *Nisi Prius*, and the justices do not take the inquest, but record it, and at the day in bank the protection is disallowed, there the inquest shall

shall be taken by default, for in this case the default was never saved, contra above. Br. Inquest, pl. 23. cites 21 H. 6. 20.

In action personal at the *Nisi Prius*, the defendant made default, and the default recorded, and after protection was cast by A. B. and recorded; and at the day in bank, repellant was cast, and therefore the inquest was awarded by default, and the reason seems to be, inasmuch as the default was recorded before the protection was cast, and in this case the defendant has *lost his challenge*; but it is said elsewhere, that he may give evidence. Br. Inquest, pl. 41. cites 4 E. 4. 1. — Br. Protection, pl. 71. cites S. C.

Br. Discon-
tinuance de
Process, pl.
24. cites S. C.

22. Quare impedit against patron and incumbent, who came at the distress, and had over of the writ, and said, that the pone was not served against the incumbent, and yet, because he was present and ready in court, therefore he was compelled to answer; and [466] so it seems that ill serving of process, or ill return, is material, where the party appears, and where the judgment is not upon the default, but upon the plea and appearance of the party. Br. Process, pl. 47. cites 9 H. 5. 3.

23. If in *præcipe quod reddat* the tenant makes default after appearance, by which petit cape issues, and after this is released or saved, and are at issue, and the tenant makes default again, now the inquest shall be taken by default, as in plea personal, and shall not have petit cape; for petit cape shall not issue after petit cape. Per Westbury; *quæro*. Br. Inquest, pl. 52. cites 9 H. 5. 12.

24. If the defendant makes default at the day of the imparlance, he shall be condemned by his default. Br. Default, pl. 78. cites 11 H. 6. 31.

25. Debt against four executors of 200l. the plaintiff recovered the 200l. of the goods of the deceased, and 20l. damages de bonis propriis, and after the plaintiff brought *scire facias* against the four executors, and they were at issue, and at the *Nisi Prius* one appeared and three made default, and by the best opinion, the inquest shall be taken, and not judgment be given by default of the three. For that executor who best pleads, or does, for the testator shall be admitted; per Newton, Paston, and Ascue, J. and if the one executor confesses the action or releases, this shall bind the others; but if the one be nonsuited, yet the others shall sue forth; and the opinion was, that if judgment shall be given by default, yet of the 20l. which was de bonis propriis, judgment shall not be given by default against all for the default of any of them, but only of the 200l. which was of the goods of the deceased; but by the best opinion, the inquest shall be taken. Br. Executors, pl. 77. cites 21 H. 6. 45.

26. In *trespass*, they are at issue, and venire facias issued, and after other venire facias issued the defendant made default, the inquest shall be awarded by his default. Br. Inquest, pl. 56. cites 22 H. 6. 4. Per Newton.

S. P. Br.
Inquest, pl.
90. cites
S. C. —
S. P. Ibid.
pl. 96. cites
S. C.

27. *Re-attachment* was sued in *trespass*, and *re-habeas corpora* against the jury, and the defendant made default; by which the inquest was taken by his default; per Cur. Br. Inquest, pl. 74. cites 1 R. 3. 4. and Fitzh. Inquest, 26.

28. The defendant does not appear, inquest may be taken by default. G. Hist. C. B. 60. 62. 81.

(R)

(R) [*Inquest taken by Default.*]
In Respect of the Issue in the Action.

[1. **I**N a writ of *mesne*, if the issue be whether the plaintiff was distrained in default of the defendant, and after the defendant makes default, the inquest may be taken by default, because by the issue the acquittal, which makes the action real, is acknowledged, and the issue is only in right of damages. 30 Ed. 3. 28. b. adjudged.]

2. In debt the defendant came by *capias* and pleaded to issue, and found mainprise to keep his day, and failed at his day, by which the inquest was awarded by his default, but no *capias* upon the mainprise; for this shall be double pain. Br. Inquest, pl. 21. cites 38 E. 3. 14.

3. In debt the defendant pleaded a release, and the plaintiff said, that *non est factum*, and at the day of *venire facias*, the defendant made default, and the inquest was taken by his default, and found for the defendant, by which the plaintiff took nothing by his writ; and yet if the plaintiff had prayed it, he might have had him condemned by the default before the taking of the verdict; and so see folly in the plaintiff. Br. Inquest, pl. 5. cites 40 E. 3. 15.

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4. In trespass, the defendant confessed the trespass, and justified, and after made default at the day of adjournment, by which the inquest was taken by default, and not writ to inquire of the damages. Br. Inquest, pl. 20. cites 9 H. 5. 15.

5. In debt it was said for law by Fortescue, that if the defendant pleads a release upon which they are at issue, and after the defendant makes default, he shall be condemned by default. Br. Inquest, pl. 3. cites 34 H. 6. 24.

6. But upon such release and default in trespass, the inquest shall be taken by default, and no diversity or reason is given by him, but that the usage has been so; but Brook says it seems to him, that the reason is, that the debt is certain, and the damages in trespass is uncertain. Br. Inquest, pl. 3. cites 34 H. 6. 24.

7. In debt the defendant pleads a release made to him by the plaintiff, the plaintiff replies, that this release was made by *duress*, and upon this they are at issue, the defendant makes default, the inquest shall be taken by default. Jenk. 81. pl. 59.

This has been the practice of the law formerly

The reason seems to be, if the defendant had appeared, and an inquest had been taken, and it had been found against him, the king should have a fine; and the default of the defendant hinders this. Jenk. 81. pl. 59.

8. But if the defendant being sued in debt, had pleaded *non est factum*, and had made default at the trial, he should be condemned without taking an inquest. Jenk. 81. pl. 59.

In neither of these cases is the obligation acknowledged by the plea. See Roll. 586. pl. 2. and pl. 7.

9. But

9. But in *trespass* the defendant pleads a *release*, and issue is joined upon it that it is *not the plaintiff's deed*, and the defendant makes default, in this case an inquest shall be taken; for *trespass is uncertain for the damages*, and a jury ought to find them; the *debt is certain*, and appears to the Court. Jenk. 81. pl. 59.

10. Upon an issue, whether *payment was made or not*, the inquest shall be taken, although the defendant makes default. Jenk. 68. pl. 30. cites 1 H. 7. 2. and 15 Ed. 4. 25.

11. In *trespass* the defendant *justified for a way, &c.* and issue being joined, *the cause came down to be tried at Nisi Prius*. But the defendant made default, and so the inquest was taken by default; and now the issue being immaterial, the Court was moved for a *repleader*. Et per Holt Ch. J. the defendant is out of court by the default, and that to all purposes but this, viz. That judgment may be given against him; therefore being out of court, there cannot be a *repleader*, unless the default could be waived, or the party could be brought into court again: 1 Salk. 216. Trin. 2 Ann. B. R. *Staple v. Hayden*.

[468] (S) *In what Cases upon a Default Judgment shall be given, or Inquest taken by Default.*

Fitzh. Af- [1.] *In an affise, if the tenant makes default at the first day, the*
fise, pl. 302.
cites S. C. inquest shall be taken by default. 30 Aff. 17 adjudged.]

— Affise of the Office of Serjeant at Mace, to the House of Commons; the plaintiff arraigned the affise the first day of the term; the tenant being demanded, made default; *ideo capitur affise, per defaultum*. Then the demandant counted, and shewed the King's Patent of the Office, which is read. The jury not being yet sworn, day was given to Wednesday next, at which time Court held, that the defendant may give what evidence he can, but not to plead in abatement, or bar of the affise, nor to challenge; and the Wednesday the cause was tried at the bar. 2 Lev. 120. Hill. 25 & 26 Car. 2. B. R. *Cragge v. Norfolk*.

[2. [So] In an affise, if the tenant be attached and makes default, judgment shall not be given, but the inquest shall be taken by default. 8 H. 6. 2. 7. b.]

In debt the defendant was effoined at the venire facias, and at the day shereof was effoined de servitio re- [3. In debt or other action, if the defendant pleads he owes him nothing, upon which they are at issue, and after he is effoined de servitio regis, and does not bring his warrant at the day, it seems the inquest shall be taken by default, though the statute of Gloucester, cap. 8. hath given a penalty for it. 21 E. 3. 62. b. But quare † 29 E. 3. 36. adjudged.]

gis, and at the day of this did not bring his warrant, and the plaintiff prayed the Inquest by default, and could have only 40s. damages for the delay, and Nisi Prius awarded where the statute of Gloucester cap. 7. is, that by such not warranting, he shall lose 20s. for the journey, or more, at the discretion of the justices shall serve. Br. Effoine, pl. 67. cites 21 E. 3. 37. — Fitzh. Enquest, pl. 8. cites 21 E. 3. 58. & F. [but seems misprinted, and that it should be 21 E. 3. 62. a. pl. 9.]
† Fitzh. Effoine, pl. 180. cites S. C.

(T) *In what Cases upon a Default an Inquest shall be taken by Default, or Judgment is to be given.*

[1. **I**T seems that where before issue upon default process shall issue, and judgment is not to be given, there after issue upon default, the inquest shall be taken by default. 11 H. 4. 32.]

[2. If by the issue the action is confessed, and a matter subsequent in discharge in trial, if the defendant makes default, judgment shall be given without taking the inquest, but otherwise e contra. 11 H. 4. 32.]

Br. Default, pl. 80. cites S. C.—Br. Enquest, pl. 16. cites S. C.—

Jenk. 81. pl. 59. cites S. C.—In debt, if the defendant pleads release, and after makes default, judgment shall be given by his default, for by such plea the debt is confessed. Per Cur. Br. Default, pl. 98. cites 8 E. 4. 6.

[3. If in debt upon an obligation, the defendant says he made it by duress, upon which they are at issue, if the defendant afterwards makes default, the inquest shall be taken, for the obligation was never acknowledged. 11 H. 4. 32.]

See (X) pl. 5. S. C.—Br. Default, pl. 80. cites 11 H. 4. 32. S. C.—

Br. Enquest, pl. 16. cites S. C.—Jenk. 81. pl. 59. S. C.

[4. But in debt upon an obligation, if the defendant pleads the release of the plaintiff, upon which they are at issue upon the denial thereof, and after the defendant makes default, judgment shall be given against the defendant, for by the pleading of the release he hath acknowledged the debt. 14 H. 4. 2. 12 H. 6. 7.]

[469] S. P. And so if he pleads acquittance. Br. Default, pl. 4. cites

34 H. 6. 38. Per Fortescue, and others.—Br. Inquest, pl. 16. S. P. cites 11 H. 4. 32.—But upon such release pleaded in trespass, and default made after, the inquest shall be awarded by default, and no condemnation by default, and the reason seems to be inasmuch as in the one case the debt is certain, and the damages in trespass not. But Fortescue said, there is no difference in reason, but the usage has been so. Br. Default, pl. 4. cites 34 H. 6. 38.

[5. If a man, in execution upon a condemnation in trespass, fines à seire facias against the recoverer upon his release, who denies it, upon which they are at issue, if the recoverer makes default at the trial, judgment shall be given upon the default, that the plaintiff shall be quit, and the inquest not taken upon the default. 12 H. 6. 7. adjudged.]

Fitzh. Seire Facias, pl. 148. cites S. C.

[6. In detinue, if the garnishee and plaintiff are at issue, and the garnishee makes default at the Nisi Prius, judgment shall be given against him upon the default, and the inquest ought not to be taken by default. 8 H. 6. 5.]

Br. Default, pl. 35. cites S. C.—The inquest shall not be taken upon

the issue; for by the default the issue is waived, and the inquest shall inquire of the damages, and the garnishee shall not have attain. Br. Inquest, pl. 37. cites S. C.—Jenk. 81. pl. 69. S. P. In detinue the defendant prayed garnishment and had it, and at the day the garnishee and the plaintiff appeared, and the defendant made default, yet the plaintiff could not have judgment by default; for the defendant has done all that he can do, and the action is now between the plaintiff and the garnishee upon inter-pleader, and upon this the garnishee pleaded release of all actions, and it was accepted. Br. Default, pl. 91. cites 39 E. 3.

[7. In

Generally, if after issue joined, the defendant makes default, the

plaintiff may proceed to trial, and have the inquest taken by default; but he shall not have judgment by default, unless in some special cases. In debt upon a bond, if the defendant pleads a release, and issue is thereupon joined, and at the trial the defendant makes default, the plaintiff may pray judgment by default and the inquest need not be taken by default, for by this plea the duty is confessed, and the plea is not made good; *aliter upon non est factum*, for thereby the duty is denied, therefore in that case the inquest must be taken by default; but in trespass, if the defendant pleads release, and makes default, the plaintiff cannot pray judgment by default, but must pray the inquest by default; for the debt was certain, but the damages are uncertain. 1 Salk. 216, 217. Trin. 2 Ann. B. R. Staple v. Hayden.

[7. In debt upon an obligation, if the defendant denies the deed, and after issue makes default, the inquest ought to be taken by default, and not judgment given, for he does not acknowledge the obligation by the plea. 12 H. 6. 7.]

Fol. 587.

[8. In account as receiver, if the defendant traverses the receipt, upon which the parties are at issue, and after the defendant makes default, no judgment shall be given, but a *capias* to hear the jury; and if he makes default (*) thereupon the inquest shall be taken by default. 30 E. 3. 12. adjudged.]

[9. In a *quid juris clamat*, if the defendant claims a fee, upon which they are at issue, and after the defendant makes default, the inquest shall not be taken by default, but the plaintiff shall recover the land. 30 E. 3. 29.]

[10. So in a *quid juris clamat*, if the issue be upon any matter *præter* the claiming a fee, and after the defendant makes default, the inquest shall not be taken by default, but a distress shall issue against the defendant to attorn. 30 E. 3. 29.]

[11. In a *quare impedit*, if the defendant comes at the grand distress returned, and pleads to the contrary, and after makes default, the writ shall be awarded to the Bishop without taking the inquest. 12 E. 2. *Quare impedit* 168.]

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12. In debt if the defendant pleads release and the plaintiff denies the deed, and at the day of *venire facias* returned, the defendant makes default now he shall be condemned by default if the plaintiff prays it, but if he takes the inquest by default, and they find against him, he shall be barred, *quod nota*. Br. Default, pl. 6. cites 42 E. 3. 1.

13. Debt upon an obligation, the defendant pleaded release of all actions, and the plaintiff denied the deed, and so to issue, and at the day he did not come by which he had another day, and at the day the defendant did not come, by which he was condemned by default *quod nota*; for by the pleading of the release the obligation is not denied, *quod nota*, and is as confessed. Br. Default, pl. 9. cites 45 E. 3. 10.

14. And note there, that if the defendant, after that he had pleaded to the inquest upon the release had made default at the first day after that he had joined issue, he shall not be condemned at this day; for the statute gives him one *essoign*, or one default, so that at the next day he may pursue, &c. Ibid.

15. If four bring writ of error upon outlawry pronounced against them in appeal of the death of the baron brought by the *feme*, and she is returned warned and does not come, and two of the plaintiffs appear and two not, the *feme* defendant shall not be demanded if all she

the plaintiffs do not come, and severance does not lie. Br. Demand, pl. 3. cites 7 H. 4. 45.

26. Where *protection* is cast at the day of the *Nisi Prius*, and repealed at the day in Bank, and the defendant makes default, the plaintiff shall not recover by default, but shall have the inquest by default; for the default at the *Nisi Prius* was saved by the protection. Br. Default, pl. 27. cites 14 H. 4. 23.

Br. Discontinuance of Process, pl. 13. cites S. C.—Br. Protection, pl. 38. cites

S. C.—Br. Enquest, pl. 18. cites S. C.—The jury shall not in such cases be demanded, but by award new process shall issue against the jury; but if the protection had been disallowed at the day in Bank, there in debt the inquest shall be taken by default; per Hank. Quære. Br. Enquest, pl. 31. cites S. C.

17. In debt the defendant pleaded release of all actions personal, the plaintiff said that he made the deed by *duress*, and at the *Nisi Prius* the defendant made default, and yet per tot. Cur. the defendant shall not be condemned by default, but the inquest shall be taken by default, for the deed is not denied, but is avoided by *duress* and by matter in law, and so see upon deed denied and default made after, the plaintiff shall recover, and the defendant shall be condemned by default. Br. Default, pl. 28. cites 9 H. 5. 13.

Br. Enquest, pl. 19. cites S. C.

18. A man condemned by *ca. fa.* got release of the plaintiff and had *scire facias ad cognoscend. factum*, and the other comes and denies the deed, by which they are at issue, and after the plaintiff makes default, the defendant shall go quit. Br. Default, pl. 76. cites 12 H. 6. 7. and Fitzh. Scire Facias 148.

19. *Trespass* against three who imparted to another term, and at the day one made default, and the two pleaded to issue in a foreign place, and therefore inquest to inquire of damages was awarded against him who made default. And so see that by default after *imparlance* the defendant shall be condemned, quod nota, and yet the other two pleaded, which intitled the third to the whole. Br. Default, pl. 38. cites 19 H. 6. 8.

20. If tenant by receipt joins issue upon *jeofail*, and after makes default, by this all the issue and *jeofail* is waived, and judgment shall be given upon the first default of tenant for term of life, and all done by the tenant by receipt is waived. Br. Waiver des Choses, pl. 46. cites 20 H. 6. 37.

21. Debt upon an obligation of 40*l.* the defendant pleaded release of all actions, &c. and *ven. facias* returned, and the defendant made default, and it was argued, if he shall be condemned by default, as if he had pleaded acquittance, which confesses the debt, and after had made default, and after several precedents were shewn, that all was one by which the defendant was condemned by default; Nota. Br. Default, pl. 68. cites 5 E. 4. 86.

Br. Enquest, pl. 37. cites S. C.

22. *Contra* where he pleads matter in fact, as condition in arbitrement, or the like, after default made, there the inquest shall be awarded by default, but he shall not be condemned by default; per Choke J. Quod non negatur. Ibid.

Br. Enquest, pl. 37. cites S. C.

23. In account the defendant pleaded that he was not his receiver, &c. and found against him, by which he was adjudged to account, and he alleged payment before the auditors, and after he made default, and

Br. Enquest, pl. 33. cites S. C. See (X) pl. 6.

the plaintiff prayed judgment by his default and could have only inquest by default. Br. Default, pl. 62. cites 1 H. 7. 2.

Br. Enquest,
pl. 33. cites
S. C.

24. *Contrā*, where a man in debt upon an obligation pleads acquittance, and after makes default, he shall be condemned by default; note the diversity, where he pleads deed of the plaintiff, and where he pleads a matter without writing. Ibid.

25. In a writ of right brought by the Lord Windsor, the plaintiff and four knights, and eleven of the grand assise appeared, and the tenant made default; the Prothonotaries said, that the default of the tenant shall only be recorded, and the jurors shall not be demanded, for the inquest shall not be taken by default in this case, as in personal actions. But says that Glanvil in his Treatise De Magna Assise, &c. is to the contrary. Dy. 98. a. pl. 51. 52. Pasch. 1 Mar. Ld. Windsor v. St. John.

But Ibid.
103. b.
S. C. a
petit cape
was awarded.

26. Husband and wife tenants in writ of right, they made default, after the wife joined, and after the wife was received to join the wife again, but if the party shall have seisin of the land, without a petit cape, in that the books differ. Dy. 98. a. pl. 53. Pasch. 1 Mar. Ld. Windsor v. St. John and Ux.

1 Salk.
216. S. C.
& S. P.
Per Holt
Ch. J. and
he said, that
in personal
actions be-
fore issue
joined,
every de-
fault was
peremp-
tory, but
after issue
joined the
first default
is not pe-
remptory,
but the se-
cond is, and
this is by
the statute
of Westm.
1 cap. 27.
and Marlb.

27. Holt Ch. J. said, that some old books hold, that where the defendant made default after issue joined, judgment should be given by default, and not the inquest taken by default. Some old books indeed are so, but I never understood the reason of them. A difference has been taken indeed, where a release was pleaded, and where other matter; in the first case, because that plea confesses the debt, if the defendant made default at the trial, judgment shall be given against him by default; but even in that case they agree, that the plaintiff may go on to trial, if he will. As to all other cases it is a general rule, that there shall be no judgment by default after issue joined. By the statutes of Westm. 2. & Marlb. the defendant can have but one default after issue joined, and that must be ad proximum diem. Now you always appear upon the return of the venire facias. But in those days the defendant was called solemnly upon the return of the venire facias; and if he made default, then went a distringas, in which was inserted a clause to distrain the defendant to appear; but if he made no default, then there was no other process to bring him into court again, and so his default was peremptory. And warned the bar never to make defaults any more; for it will be hard to maintain, that any judgment can be given for the defendant, after he has made default. Powell J. said, that a defendant that has made default, is not so out of court, but that judgment may be given against him, but he can never have a day in court again. 2 Ld. Raym. Rep. 925. Trin. 2 Ann. in case of Staples v. Heydon.

(U) *In what Cases Judgment shall be given upon a Default.*

[*And in what Cases a Writ shall issue ad Audiendum Judicium.*]

[1. **I** *N* *dedi*, if there be a demurrer in judgment upon a plea in bar, and after the plaintiff makes default, a writ shall issue against him *ad audiendum judicium*. 20 H. 6. 44. b.]

are as issue or demur, and after the defendant makes default, the judgment shall be upon default, and the demurrer or issue waived. Br. Default, pl. 58. cites 38 H. 6. 33. Per Moyle.

Fitzh. Jour. pl. 33. cites S. C.—
In deb if the parties

[2. *In an audita querela* the defendant appears, and the plaintiff declares, and was let to mainprise, and after the defendant makes default, the plaintiff shall not have judgment against him because he never pleaded, but a distress shall issue. 47 E. 3. 1. b.]

pl. 2. cites S. C.—Br. Default, pl. 79. cites S. C.

[3. *But if he pleads, and after makes default, a writ ad audiendum judicium* shall issue. 47 E. 3. 1. b.]

S. C.—Fitzh. Audita Querela, pl. 2. cites S. C.—Br. Default, pl. 79. cites S. C.

Br. Audita Querela, pl. 7. cites

[4. If the defendant after appearance departs in despite of the court, judgment shall be against him. 7 H. 6. 39. b.]

[5. If the defendant appears, and the Court gives a day to another term, at which day he makes default, yet no judgment shall be given. 7 H. 6. 39. b. 41. b.]

[6. *But process shall be awarded* in this case. 7 H. 6. 41. b. dubitatur.]

of malbem against him, and they appeared to the bill, and day was given in this form, viz. ad istam billam comparentibus tam querente quam defendente super hoc dies datus est usque in diem Jovis, &c. salvo defendenti exceptionibus suis ad billam, ad personam, et advantagium quibuscumque, and after the defendant was demanded and made default. Vampage said, if a man appears and says nothing, the plaintiff shall recover for want of answer, and if he appears and makes default in the same term, he shall be condemned; for this is a departure in despic, and if he impales and makes default at the day, he shall be condemned; by which he prayed, that he shall be condemned. And the first cases were not denied which Vampage put, but in this case, because the day was given by the Court, therefore he is out of the case, and shall not be condemned, quod nota; for he did not demand the day as upon imparlance, nor had oyer of the bill, therefore shall not be condemned, quod nota, by award, and those matters are in personal actions, and not in actions real, but there upon imparlance it seems, that the tenant shall lose seisin of the land, and in the other case petit capes shall issue, as it seems. Br. Default, pl. 34. cites 7 H. 6. 39. 41.—Br. Bille, pl. 6. cites S. C.

A man demanded
sawery of
J. R. in
b. R. by
which bere-
nained in
ward, and
upon this he
brought bill

[7. *In a writ of annuity, if the defendant makes default after appearance, the plaintiff shall recover the annuity.* 2 H. 4. 4.]

[8. *But 2 H. 4. 1. b. per Curiam, a writ shall issue to hear judgment.*]

makes default after appearance, distress ad audiendum judicium shall issue. Quere H. 6. R. 2. Br. Default, pl. 81. (8a) cites a H. 4. a. S. C.—Fitzh. Process, pl. 116. cites S. C.

Br. Bille, pl. 6. cites S. C.

In annuity if the defendant

[9. *In a writ of annuity, if the defendant hath aid of the king's patron, and of the ordinary, and after a procedendo comes, and the*

defendant and the other praesides make default, no writ shall issue ad audiendum judicium, but he shall be summoned to answer. 29 E. 3. 3.]

* Br. Default, pl. 15. cites S. C.

In debt the defendant pleaded in abatement of the writ, and the plaintiff im-

paired, and

at the day of the imparlance the defendant made default, and the plaintiff demanded judgment to recover by his default, and per tot. Cur. except Moyle, he shall have judgment to recover by the default after appearance, quia nihil dicit; for if he who appears and pleads, does not maintain it, this is quasi nihil dicit; and after by advice of all the Justices, the plaintiff recovered his debt, and damages, taxed by the Court. Br. Default, pl. 58. cites 38 H. 6. 33.

† Br. Inquest, pl. 11. cites S. C.——But in plea real, upon such default after imparlance, shall issue petit cape. Br. Ibid.——But it seems, that in trespass upon such default, where there is no demand certain, there inquest shall be taken by his default. Br. Ibid.——Br. Peremptory, pl. 27. cites S. C.

‡ Br. Inquest, pl. 11. cites S. C.——But in debt of 20 quarters of corn, the defendant had peremptory day after imparlance, to answer, and did not come, and the plaintiff prayed his debt and damages to be assessed by the Court; Brian denied it; for this varies from the common action of debt of money which is debt and detain; but this action is in the detain only, and therefore the value of the corn shall be inquired at the time, &c. and therefore writ shall be to inquire of the value, per Judicium. Br. Default, pl. 104. cites 11 H. 7. 5.——See (T.) pl. 7. and the notes there.

Br. Judgment, pl. 108. cites S. C.——Br. Default, pl. 45. cites S. C.——Fitzh. Judgment, pl. 7. cites S. C.

[13. When an issue is found for the demandant, if the tenant makes default after, judgment shall be given; for after issue nothing remains but to give judgment. 4 H. 6. 28.]

S. P. but Rolf and some Justices said, the demandant

shall not have judgment to recover, but shall have petit cape; but per Martin, this is a trial as trial by verdict, and after trial by verdict, the demandant shall recover the land, notwithstanding, that the tenant makes default, by which the demandant prayed his judgment at his peril, and had it. Br. Default, pl. 45. cites 4 H. 6. 28.——Fitzh. Judgment, pl. 7. cites S. C.——Br. Judgment, pl. 108. cites S. C.

Fitzh. Judgment, pl. 7. cites S. C.

[15. So if after issue found for the plaintiff at the Nisi Prius, if a day be given in banco, and the defendant makes default, judgment shall be given against him. 4 H. 6. 28.]

16. in quare impedit, if the defendant makes default after appearance, the plaintiff shall recover the presentment and his damages, and have writ to the bishop, but if he had taken continuance and had made default, distress ad audiendum judicium should issue. Br. Default, pl. 80. cites 2 H. 4. 1. & 6 R. 2.

17. If vouchee appears by attorney, and after casts protection, which is repealed the next day, seisin of the land shall be awarded; for default and appearance cannot be all at one and the same day. Br. Default, pl. 18. cites 7 H. 4. 19.

* 18. Where

Default.

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18. Where *tenant in præcipe quod reddat* appears at the *Nisi Prius* by attorney, who has no warrant, this shall turn him in default at the day in bank, though the jury be taken and pass for the demandant and petit cape shall be awarded and no seisin of the land. Br. Default, pl. 26. cites 14 H. 4. 16.

Br. Garantie de attorney, pl. 11. cites S. C. that at the day in bank, Hull

would not record any warrant, and so it was taken as a default.

* 19. In debt, the defendant pleaded misnomer, and the plaintiff imparled and at the day the defendant made default, and by the opinion of all the Justices, except Moile, the plaintiff shall recover, and no distress ad manutenendum placitum shall issue. Br. Default, pl. 51. cites 27 H. 6. 27.

Br. Judgment. pl. 110. cites 37 H. 6. 27. Per Priot.

20. So if he had pleaded in bar, and after had made default, and this in plea personal; but in plea real, petit cape shall issue. Ibid.

S. P. For a man shall recover by default after appearance,

as well in plea personal, as he shall have seisin of the land in plea real by default after imparlance in one and the same term, and if in another term, then petit cape in plea real, and upon such default in plea personal, if the thing be uncertain, as damages in trespass, &c. he shall have writ to inquire of the damages. Br. Judgment, pl. 110. cites 37 H. 6. 27.

21. If *tenant in præcipe quod reddat* appears and imparles, and after makes default, seisin of the land shall be awarded and not petit-cape; per Priot quod non negatur quod nota. Br. Default, pl. 58. cites 38 H. 6. 33.

22. And per Priot in consimili casu 39 H. 6. 16. every default after imparlance is peremptory, and so in writ of right if the tenant vouches, and the vouchee appears and enters into the warranty, and imparles, and after makes default, the demandant shall recover seisin of the land against the tenant, and the tenant over in value, &c. Ibid.

23. In a writ of right, *quia dominus remisit Curiam suam domino regi*, by baron and feme, where the wife appeared per prachein amy being within age, the tenants vouched the common vouches, who entred and joined the mise upon the meer right, and afterwards made default, and judgment final was given against the vouches and his heirs, and against the tenants and their heirs. Dyer, 56. a. pl. 17. Trin. 35 H. 8. Anon.

24. In a writ of right if the tenant makes default after the mise joined the judgment shall be final. F. N. B. 6. (N). S. C. cited 5 Rep. 86. a. Trin. 38. Eliz. in Penryn's case, and resolved e contra, viz. That final judgment shall not be given in such case, but a petit cape shall issue; for peradventure he may save his default. Bull. 161, 162. Trin. 9 Jac. the resolution in Penryn's case. 5 Rep. 86. cited, and denied per Cur. 2 Saund. 46. Hill. 21 & 22 Car. 2. S. P. accordingly, in case of Williams v. Gwyn.

25. Error of a judgment in dower; after issue the tenant being an infant made default, a petit cape was awarded, and judgment given by default; the Court held it no error, especially it being after appearance, for he cannot save his default by non-summons. Cro. E. 308. pl. 16. Mich. 35 & 36 Eliz. B. R. Gore v. Purdue.

26. Error of a judgment in a writ of right of lands in T. The writ was *quia dominus nobis remisit Curiam suam*; the defendant

Bull. 159. Herne v. Whitlock. S. C. the

whole Court seemed all clear of opinion, that the judgment given at Durham was erroneous, but the reversal thereof was not pronounced,

and upon the declaring the opinion of the Court, the parties ended the same between themselves, without further moving of the Court herein.——Yelv. 511. S. C. and the difference taken between general and special imparlance, which is to a day certain, in which case the tenant is not bound to appear till the day, and there may be some cause whereby to excuse his default, and then no laches in him, and consequently no reason that he should lose his land peremptorily, where the right appears not to the Court, and where he is not guilty of any contempt. Quod nota; Per tot. Cur.

defendant after divers imparlances made default and final judgment was given in Durham, error assigned was, because final judgment was given upon a default after imparlance, where it ought to have been only a petit cape; the Court did not give any resolution in that point, but seemed to incline that a judgment final should not be given, unless upon a departure in despite of the Court, which is upon a default of the tenants the same term after imparlance. But if day be given to any other term, or time certain, and then the tenant makes default, it shall be otherwise. Cro. J. 292. pl. 2. Mich. 9 Jac. Lilburn v. Heron.

[475] 27. Error was brought of a judgment in quod ei deferat at the grand sessions in Wales, and assigned for error that judgment final was given upon default after appearance, where it ought to be petit cape in all real actions upon default after appearance, and grand cape upon default before appearance, which the Court held manifest error. Lev. 105. Trin. 15 Car. 2. B. R. Slaughter v. Tucker.

1 Ld. Raym. Rep. 924. 625. S. P. by Holt Ch. J. in S. C.

28. If the tenant makes default in a real action, a grand cape is awarded, and upon the return of it, if the demandant insists upon the default, he must have judgment final; but the demandant may waive the default, and take an appearance upon the grand cape; and that is regular because the tenant comes in by process; and so it is of a default on a petit cape, but in a personal action there is no process to bring the party into Court again; also the day of the Nisi Prius not being the same with the day in bank, a default at Nisi Prius cannot be waived at the day in bank. Per Holt Ch. J. 1 Salk. 217. Trin. 2 Ann. B. R. in case of Staple v. Hayden.

29. A writ of right for land is brought against A. he does not appear; a grand cape issues, he makes default at the grand cape; judgment final shall not be given till appearance and trial by battle after the mise joined upon the meer right, or trial by the grand assise; or after the mise joined, and a departure in despite of the Court; or after the mise joined, and a default and a petit cape awarded, and upon this the default not saved. In these several cases final judgment shall be given. Jenk, 141. pl. 91.

(X) *In what Cases after Plea pleaded Judgment shall be given upon Default without a Writ ad Audientium Judicium.*

Fol. 588.

[1. IF the defendant makes default after such plea pleaded, which is a confession of the action, and only a matter of discharge subsequent, judgment shall be given upon the default, but otherwise e contra. 11 H. 4. 32.]

Br. Enquest, pl. 16. cites S. C. where S. P. is admitted.—
Br. Default, pl. 20. cites S. C.

[2. As in an action of debt, if the defendant pleads an acquittance or release, and after makes default, judgment shall be upon the default, because the duty is acknowledged. * 11 H. 4. 32. † 1 H. 7. 1. ‡ 2 H. 4. 23. 12 H. 6. 7.]

* Br. Enquest, pl. 16. cites S. C.—Br. Default, pl. 20. cites

11 H. 4. 31. Per Hank, S. C.—S. P. Br. Default, pl. 92. cites 5 E. 4. 6. Per Cur. † Br. Default, pl. 62. cites 1 H. 7. 2. S. C.—Fitzh. Condemnation, pl. 5. cites S. C. ‡ Br. Default, pl. 15. cites S. C.

[3. In replevin, if the defendant avows, and after makes default, judgment shall be thereupon for the damages, because the taking and detinue are acknowledged. * 11 H. 4. 32. † 14 H. 4. 2.]

Br. Default, pl. 20. cites 11 H. 4. 31. S. C. Per Thirning and Hank.

* Br. Enquest, pl. 16. cites S. C. but not S. P.—Fitzh. Condemnation, pl. 10. cites S. C. † Fitzh. Condemnation, pl. 11. cites S. C.

[4. But otherwise it is e contra.]

[5. As in debt upon an obligation, the defendant pleads that he made it by duress, and after makes default, no judgment shall be, but process shall issue for it, because here the deed was never acknowledged. 11 H. 4. 32.]

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Br. Enquest, pl. 16. cites S. C.—
Br. Default,

pl. 20. cites 11 H. 4. 31. S. C.—See (T) pl. 3. and the notes there.

[6. In account as receiver, if the defendant traverses the receipt, and after makes default, no judgment shall be, but process. 30 E. 3. 12. adjudged.

7. Where the defendant in action personal appears and pleads, and after makes default, he shall be condemned by default, quia nihil dicit. Br. Default, pl. 58. cites 38 H. 6. 33. per Prisot.

8. In trespass the defendant came by capi corpus and pleaded in bar, and the plaintiff replied, upon which the defendant demurred, and was let to mainprise de die in diem, and at the day made default, and by award he was condemned by default, and writ awarded to inquire of the damages and cape pro fine regis against the mainpernors. Br. Default, pl. 73. cites 18 E. 4. 7.

9. So where he pleads to issue and makes default; and if he pleads to issue and remains in ward, there he shall not be condemned by default, but the warden shall be commanded to bring him in, but

if he was by mainprise, the inquest shall be awarded by his default. Ibid.

(Y) After Default. *Where a Writ is to be awarded ad Audiendum Judicium, what Proceſs there ſhall be.*

Fitch. Con-
demnation,
pl. 10, cites
S. C.
Fitch. Con-
demnation,
pl. 10, cites
S. C.

S. P. Br.
Default,
pl. 46, cites
4 H. 6. 28.

[1.] **I**N a writ of debt, if the defendant comes by exigent, and pleads in bar, and after makes default, a capias shall be awarded. 11 H. 4. 32.]

[2.] And if he makes default upon the capias, what proceſs ſhall be awarded, *quare*. 11 H. 4. 32.]

3. Where the one of the demandants and the tenant make default at the ſummons, grand cape ſhall iſſue of the whole, and ſummons ad ſequenda ſimul, and if the other demandant who made default, appears, and the tenant makes default again, they ſhall recover the whole, but if the other demandant and the tenant make default again, there the other demandant who appears ſhall recover the moiety only, *quod nota*. Br. Proceſs, pl. 79, cites 9 E. 4. 2.

(Y. 2) Judgment for Default.
At what Time.

1. **A** MAN ſhall not be condemned by his default, but after plea pleaded or imparlance; for the dies datus is always before the count, and the imparlance is after the count. Note the difference, for it is good. Br. Default, pl. 1, cites 19 H. 8. 6.

[477] (Z) *Who ſhall be put to answer.* [One who comes or is brought into Court for another Purpose.]

Br. Reſpon-
der, pl. 48,
cites S. C.
and that ſo
it is, if he

[1.] **I**F a man comes in bank upon a capi corpus, and I have a writ depending againſt him there, he ſhall be put to answer thereto. 9 H. 6. 55. for there he is in ward of the court.]

be in the cuſtody of a ſheriff, who has proceſs againſt him out of bank, he ſhall answer, *unleſs* he denies that he is the ſame perſon, but if he denies his being the ſame perſon, then he ſhall not. *Contra*, if he comes by writ in ward of the ſheriff of London, upon a plaint there, for in that caſe he is a priſoner to London, and not to the Bank.

Two writs
of treſpaſs
were
brought
againſt one
and the ſame

[2.] If a man be committed to the Fleet by the Common Pleas, and another ſues a writ againſt him, the warden of the Fleet ſhall be commanded to bring him in, and when he comes into court, he ſhall be put to answer thereto without writ. 9 H. 6. 55.]

man, he came upon the one writ by exigent *quarto exactus*, and therefore by Newton, he ſhall be priſoner to the Fleet, and ſhall pay fees; and he would not have appeared to the other writ, but becauſe he is the ſame perſon, and is priſoner to the Fleet, therefore the Court compelled him to answer to the other writ alſo, *quod nota*; for they may ſend for him to the warden of the Fleet,

and

and if he will not answer, he shall be condemned. Br. Default, pl. 49: cites 22 H. 6. 51. — Br. Responder, pl. 51. cites S. C.

[3. If a man imprisoned in B. R. be brought in Banco by habeas corpus to answer a writ there depending, when he comes he shall be put to answer thereto, for he was brought there for this purpose, yet he is not committed in Banco. 9 H. 6. 54. b.]

Br. Default, pl. 57. S. P. and this by Prioſt, where he is implead-

ed by writ, but contra if he be impleaded by plaint, cites 38 H. 6. 30. — Br. Imprisonment, pl. 58. cites S. C. but a quære is there added, if this suit by writ or by plaint, shall be intended of the suit in B. R. or of the suit in C. B.

[4. If a man be brought in Banco upon an habeas corpus to have the privilege because he was arrested coming to court, if another hath a writ against him, he shall not be put to answer thereto, because he is not in ward of the court, but in the custody of the serjeant who brings him in; and the question only is, whether he is to be delivered, or to be remanded. 9 H. 6. 54. b.]

Br. Responder, pl. 51. cites 39 H. 6. 50. S. P. — [and the opinion of the Court there was,

that he should be remanded.

5. In plea of land at the petit cape returned the demandant was effoined, and had day till now, and the demandant held him to the default. Trewe said, the default cannot be taken; for it is gone by the effoin, and notwithstanding this, the tenant was compelled to answer to the default. Br. Effoine, pl. 87. cites 5 Ass. 10.

6. He who is taken in pais by warrant of a justice of peace, and after is taken by capias out of C. B. he shall answer in Bank, and shall be by mainprise, and then shall be remitted into pais to answer before the justices of peace there. Br. Responder, pl. 33. cites 2 H. 7.

Br. Retorne de Brief, pl. 83. cites 2 H. 7. 2. S. C.

7. H. upon a habeas corpus was returned by the warden of the Fleet, and now a stranger would declare against him here in B. R. in an action. But Coke Ch. J. cites 31 H. 6. 10. that if a man declares against another in B. R. before he is in the Marshalsea by writ, this is coram non iudice, but it is not material what writ it is he comes into the Marshalsea by, if he is there; and so in this case no declaration can be good against H. if he be remanded to the Fleet immediately upon the first return, and not committed to the marshal; and H. was committed to the marshal, because he said also, that he would not put in bail to answer the action. Roll. Rep. 217. pl. 18. Trin. 13 Jac. B. R. Hilderſham's case. [478]

(A. 2) To what Thing the Answer ought to be made.

[1. IF a bill be in B. R. de placito transgressionis & de insultu, & verberatione vi & armis, and the plaintiff declares of an assault and battery, and that the defendant at the same time took of him extorsive 10s. &c.]

2. If the parties are at issue, or demurrer be in plea real, there petit cape shall be awarded to answer to the default only, and all the issue

issue and demurrer is waived. Br. Default, pl. 58. cites 38 H. 6. 33.

3. *And per Priot upon the grand cape, the tenant shall answer to the default and to the demand also, but upon petit cape the tenant shall answer to the default only, and not to the matter; per Priot.* Ibid.

Fol. 589.

(B. a) *At what Time he shall be put to answer.*
[Where there are two Defendants, and one makes Default.]

[1. *In a praeipe quod reddat against two, if one appears, and the other makes default, by which the grand cape issues of a moiety, he that appears shall not be put to answer till the grand cape be returned, because that at this day he, that made default may accept the intire tenancy, and save his default.* 12 H. 6. 6. b.]

No part shall be recovered by the default.
Br. Default, pl. 79. cites 49 E. 3. 15.

[2. *In a writ of ward against two, if one appears, and the other makes default, he that appears shall not be put to answer before the other comes, because the ward is intire.* 17 E. 3. 70. b.]

[3. *But otherwise it is in an ejectment of ward, because this is but in nature of a trespass.* 17 E. 3. 70. b.]

[4. *The same law is for the same reason in a ravishment of ward.* 17 E. 3. 70. b.]

Br. Responder, pl. 31. cites S. C. accordingly, but if the comes, and he does not, she shall not answer till he comes, or till he be outlawed.—Br. Default, pl. 61. cites S. C.—Fish. Respond. pl. 40. cites S. C.

[5. *In trespass against baron and feme, if the baron appears, and the feme makes default, admitting this is not the default of both, the baron shall be put to answer presently.* 22 Aff. 46. adjudged.]

[6. *In an action of trespass against baron and feme, if the baron comes by the exigent, and the feme does not come, and because it appears to the Court that the exigent was discontinued against the*

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feme, they award a new exigent against her, yet the baron shall be put to answer presently, and shall not stay till the feme comes, though he ought to make answer again with the feme when she comes; and when he has pleaded, he shall have idem dies with the feme. 39 E. 3. 18. b. adjudged.]

S. P. But if the baron comes, and the feme not, he shall be received to answer alone. Br. Default, pl. 61. cites S. C.—Fish. Respond. pl. 40. cites S. C.—Br. Responder, pl. 31. cites S. C.

[7. *In trespass against baron and feme, if the baron makes default, and the feme appears, the feme shall not be put to answer till the baron comes or be outlawed.* 22 Aff. 46.

[8. *In an action of debt against baron and feme, if the baron appears, and the feme makes default, the baron shall not be put to answer, but process shall issue against the feme, and idem dies given to the baron.* Mich. 11 Ja. B. between Throsgood and Dunnam:]

[9. In

[9. In all real actions where the process is by attachment and distress, and the action is brought against two, and one comes by the distress, yet he shall not be put to answer without the other, which did not appear, for the other shall not lose his freehold by his plea. 39 E. 3. 15. b.]

[10. As in a *quod permittat* against two, if one comes by attachment and distress, yet he shall not be put to answer without the other. 39 E. 3. 15. b.]

[11. In an action against two, if the process be determined against one, and the other appears, he shall be put to answer. 39 E. 3. 15. b.]

[12. As in an action of waste against two, if at the great distress returned one makes default, and the other appears, he shall be put to answer, because by the statute the process is determined against the other. 39 E. 3. 15. b. adjudged.]

13. *Scire facias* upon a recovery against baron and feme, the baron came, and not the feme, and the tenant took the entire tenancy *absque hoc* that his feme any thing bad, and well notwithstanding the first judgment against both; for the tenancy may be transposed after. Br. Default, pl. 97. cites 45 E. 3. 5.

14. A writ of conspiracy is brought against two; one appears and pleads not guilty, the other makes default; the jury finds that he who pleads, conspired with the other who makes default; the plaintiff has judgment and affirmed in error; for although he who makes default cannot be convicted of the said conspiracy, because he does not appear, yet the law gives such credit to this verdict, that it shall be intended to be true as to the conspiracy against him who pleaded, until it be disproved by an attain. Jenk. 27. pl. 51.

(C. a) Saved in Plea Real. By what Plea.

1. **I**N writ against two, at the grand cape the one took the entire tenancy, and was received to wage his law of non-summans for all. Thel. Dig. 189. Lib. 12. cap. 27. S. 2. cites Pasch. 4 E. 3. 131. Mich. 6 E. 3. 284.

2. In writ brought by two against three at the grand cape returned against all, the tenants came and waged their law of non-summans in common, and at the day given two came and the third made default, upon which it was said that he who made default is dead, yet the other two made their law, by which the writ abated for the two parts, and seisin awarded of the third part. Thel. [480] Dig. 189. Lib. 12. cap. 27. S. 3. cites Mich. 6 E. 3. 278.

3. In writ against several, if the demandant holds himself to the default made by one of them, and he makes his law or javes his default all the writ shall abate. Thel. Dig. 189. Lib. 12. cap. 27. S. 4. cites Mich. 7 E. 3. 345. For there all the writ abated because the demandant held himself to the default made by one who was an infant at the time of the default made, and it is said there, that the demandant cannot release the default of the one and hold to the default of the other. 13 E. 3. Ley, 50.

4. In

4. In writ by two against one at the grand cape returned the tenant came, and against one of the demandants pleaded his release of all rights made after the default, and against the other he waged his law of non-summons, and was received to it. Thel. Dig. 189. Lib. 12. cap. 27. S. 5. cites Mich. 9 E. 470.

5. At the grand cape returned, the tenant was *essoigned de servitio regis*, and at the day given by the *essoign*, he came and disavowed the *essoign*, and tendered his law of non-summons, and said that the *essoign* was not cast for him, &c. but the demandant refused his law, by which the writ was abated. Thel. Dig. 189. Lib. 12. cap. 27. S. 6. cites Trin. 11 E. 3. Ley, 44.

Thel. Dig. 189. Lib. 12. cap. 27. S. 9. says, it seems by the opinion of Trin.

7 E. 3. 41. That in such case where the tenant is *essoigned* of common *essoign*, and afterwards of *essoign de servitio regis*, and after make default of the grand cape, if the demandant takes himself to the default only, it suffices for the tenant to wage his law of non-summons only, without defending that the *essoigns* were not cast for him. But otherwise, it is, if the demandant holds himself to all. And says, see such law of non-summons, and that the *essoign* was not cast for him. 10 H. 6. 9.

6. The tenant was *essoigned* and after made default, and at the grand cape returned he was *essoigned de servitio*, and at the day given he would have waged his law, that the *essoign de servitio regis* was not cast for him, and was not received, but seisin was awarded to the demandant; but if the tenant be *essoigned* of common *essoign*, and afterwards *essoigned de servitio regis*, and then makes default, there at the day of the grand cape returned he may defeat all by his law and abate the writ. Thel. Dig. 189. Lib. 12. cap. 27. S. 8. cites Hill. 12 E. 3. Saver Default, 43. and says see 12 H. 4. 14, 15.

7. The tenant being dumb, but he could hear and understand that which one said to him, put his hand upon the book, and the words of the charge were read to him, and then the demandant waived the default, by which the writ abated. Thel. Dig. 189. Lib. 12. cap. 27. S. 7. cites Pasch. 13 E. 3. Ley, 49.

8. In writ against two, at the grand cape they waged their law of non-summons, and at the day given the one did not come, but the other came and made his law, by which all the writ abated, &c. Thel. Dig. 189. Lib. 12. cap. 27. S. 10. cites Hill. 18 E. 3. 6. Quære. And says see 7 E. 3. Ca. 29 E. 3. 11. That it shall not abate but only for the moiety. And that so agrees 38 E. 3. 33. & 41 E. 3. 2.

9. In writ against four at the grand cape returned, one of the tenants came, and took several tenancy of the moiety, and made his law of non-summons by assent of the demandant immediately, by which the writ abated for the moiety, and seisin awarded of the rest. Thel. Dig. 189. Lib. 12. cap. 27. S. 11. cites Hill. 22 E. 3. 2.

10. The baron and feme and a third person waged their law of non-summons, and at the day given they came, but the third was within age, by which Thorp made the baron and feme to swear alone and the writ abated. Thel. Dig. 189. Lib. 12. cap. 27. S. 12. cites Pasch. 38 E. 3. 10.

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11. In writ against two, if they wage their law of non-summons in common, and at the day given, if the one makes default and the other comes, he who comes then cannot take the entire tenancy and make

make his law for all, but only for the moiety. Thel. Dig. 190. Lib. 12. cap. 27. S. 15. cites Hill. 41 E. 3. 2.

12. But in such case he who comes may make his law for his portion, and abate the writ for this portion, notwithstanding the wager in common. Thel. Dig. 190. Lib. 12. cap. 27. S. 15. Hill. 41 E. 3. 2. and 48 E. 3. 13.

13. If the tenant wages his law of non-summons, and at the day given is ready to make his law, at this day the demandant cannot waive the default and put the tenant to plead over without the assent of the tenant. Thel. Dig. 189. Lib. 12. cap. 27. S. 13. cites Hill. 42 E. 3. 8. and cites Hill. 19 E. 2. Saver Default, 81.

14. In writ against baron and feme, the baron made default, and the feme appeared always by attorney, and at the day of the grand cape returned both appeared, and the baron alone waged and made his law of non-summons, and the feme not, by which the writ abated, Quere; for it was said, that the law ought to be made by the baron and feme. Thel. Dig. 189. Lib. 12. cap. 27. S. 14. cites Mich. 44 E. 3. 38.

15. *Præcipe quod reddat*, at the petit cape the demandant held him to the default; by which the tenant said, that he had an attorney, who died before the day, we not knowing it, and the demandant said, that he had notice of his death; and per Cur. he shew at what place he had notice by reason of the vifue; and so a good plea; quod nota. Br. Saver Default, pl. 15. cites 50 E. 3. 9. S. P. Br. Saver Default, pl. 31. cites 5 H. 7. 3.

16. The vouchee in *præcipe quod reddat*, shall not wage his law, that he was summoned upon the summons, for he need not save his default at the grand cape ad valentiam; but if he be returned summoned, when he was not summoned, and after grand cape ad valentiam issues, he shall have disceit of the return, &c. Br. Leygager, pl. 27. cites 50 E. 3. 16.

17. Note, per Belknap, that the vouchee who came by the grand cape ad valentiam need not save his default at the summons, nor shall any take advantage thereof; for land is demanded against him in certain, &c. yet by non-summons at the writ of summons and grand cape the vouchee shall have writ of disceit, and yet the summons cannot be defeated by ley-gager of non-summons, nor by any other issue; quod nemo negavit, &c. in action of disceit. Br. Saver Default, pl. 42. cites 50 E. 3. 17. Thel. Dig. 190. Lib. 12. cap. 27. S. 16. cites S. C. and 33 E. 3. Saver Default, 72. but it is otherwise where the

vouchee makes default after appearance. Cites Mich. 9 E. 2. Saver Default, 76.

18. In *formedon* the petit cape issued against the tenant, and afterwards the parcel was put without day by demise of the King, and at the re-summons the tenant made default and grand cape awarded, by which the tenant came and waged his law of non-summons, and was received. Thel. Dig. 190. Lib. 12. cap. 27. S. 17. cites Mich. 2 H. 4. 14. and says see 13 H. 4. 9. that Thirning agreed to it, and Hankford denied it.

19. Petit cape issued returnable such a day, the tenant came and said that his attorney died a little before the day in court, of whose death he had no notice before the petit cape awarded, and was ready to answer; and the demandant held him to the default, and said that

that the other died three weeks before the petit cape awarded; by which the tenant had notice before the petit cape awarded; and the tenant durst not demur, but *pleaded an overflowing of water* at a certain place; upon * which they were at issue. Br. Saver Default, pl. 17. cites 12 H. 4. 1.

20. *Præcipe quod reddat against baron and feme*, the baron at the grand cape came and said that he is sole tenant and tendered his law of non-summmons, and the demandant said, that the baron and feme were tenants the day of the writ purchased; per Cot. this is no plea. Quæro. Br. Saver Default, pl. 3. cites 3 H. 6. 23.

21. *Writ of aiel*, the tenant made default at the summons, and came at the grand cape, and said that he was imprisoned in the castle of O. upon a statute merchant at the suit of J. S. at the time of the summons returned, and by the opinion of the Court this a good plea; for he is imprisoned by the order of the law, notwithstanding it was by reason of his own act; quod nota, and outlawry shall be severed for such cause. Br. Saver Default, pl. 4. cites 3 H. 6. 46.

22. It is said, that *corporation, recluse, and deerepit*, cannot make their law, but that their summons shall be tried per pais. Quære. Thel. Dig. 190. Lib. 12. cap. 27. S. 18. cites Hill. 33 H. 6. 8.

23. Thel. Dig. 189. Lib. 12. cap. 27. S. 1. says, it seems that at the time of Bracton, the writ should not abate notwithstanding that the tenant made his law of non-summmons, for he wrote in his Treatise, 3 Lib. 5. cap. 1. fol. 366. *Ad diem vero legis, aut tenens facit legem suam, aut deficit in lege facienda, si autem legem fecerit tanquam excusatus a defaulta eodem die ad placitum principale respondebit, sufficit enim ad dilationem & pro rationabili summoritione tenentis tempus intermedium inter legem variatam & legem factam.* And a little afterwards in answering to the question, for what reason the writ should not abate by the making of the law of non-summmons, he says, sufficit ei pro commodo propriæ seisinæ reformatio.

(D. a) In real Actions. What Plea may be pleaded before the saving the Default.

1. **A**T the grand cape returned against the baron and feme, the baron appeared and was received to say that he had no feme the day of the writ purchased, without saving his default. Thel. Dig. 210. Lib. 14. cap. 16. S. 4. cites Trin. 19 E. 2. Saver Default, 33.

2. At the grand cape returned the tenant was received to say, that he was the villein of such a one, and held the land in villinage, &c. without saving his default; because he had not appeared before to affirm the tenancy in his person. Thel. Dig. 210. Lib. 14. cap. 16. S. 7. cites Pasch. 6 E. 3. 254.

3. At the grand cape returned the tenant was received to say, that the demandant had disseised him after the default, and is yet tenant

tenant by this disseisin without saving his default. Thel. Dig. 210. Lib. 14. cap. 16. S. 9. cites Palch. 8 E. 3. 388.

4. But such plea is not good, without saying that the demandant is yet seised of the land. Thel. Dig. 210. Lib. 14. cap. 16. S. 9. cites Palch. 9 E. 3. 455.

5. But at the *petit cape* returned, the first plea is adjudged no plea without saving the default. Thel. Dig. 210. Lib. 14. cap. 16. S. 9. cites Mich. 10 E. 3. 541. Saver Default, 59.

6. In answer at the *petit cape* returned, the tenant was received to say, that the demandant had disseised him after the default made, without saving his default. Thel. Dig. 210. Lib. 14. cap. 16. [483] S. 13. cites Hill. 16 E. 3. 32.

7. At the *grand cape* returned against several it is said, that they cannot plead several tenancy of the moiety to the writ without saving their default. Thel. Dig. 210. Lib. 14. cap. 16. S. 16. cites Hill. 22 E. 3. 2.

8. *Præcipe quod reddat* by a feme; at the *petit cape* returned, the tenant said, that the demandant had taken baron after the last continuance, judgment of the writ, per Belk. a release of right she may plead before the default saved, &c. but not this plea. Per Chelr. she may plead disseisin by the demandant done to the tenant, and may allege profession in the demandant, which Knivet agreed; for this extinguishes the right; by which it was awarded that the demandant recover seisin of the land; quod nota. Br. Saver Default, pl. 23. cites 29 E. 3.

9. At the *petit cape* the tenant cannot say that the tenements are seised into the hands of the King by office, by which it was found that they were the tenements of an idiot, &c. notwithstanding that he shews writ of the King testifying it, and patent of the King of grant made of them for this cause, &c. without saving his default. But execution was stayed. Thel. Dig. 210. Lib. 14. cap. 16. S. 18. cites Mich. 31 E. 3. Saver Default, 37.

10. *Præcipe quod reddat* against three who made default, and at the *grand cape* they appeared, and each pleaded several tenancy of parcel to the writ, and tendered their law of non-summons. Per Belk. you cannot plead to the writ before your default saved. And per Mombray, because you do not deny the several tenancy, you shall take nothing by your writ. Br. Saver Default, pl. 20. cites 38 E. 3. 28.

11. *Præcipe quod reddat*; at the *grand cape* the tenant came and said, that A. was seised before the writ brought, and leased to him in fee by deed rendering rent upon condition that if she paid 40l. that she should re-enter, and that after the default made A. paid the 40l. and re-entered, and so the writ abated in law, judgment of the writ; and it was admitted there that it is a good plea before the default saved, by which the demandant relinquished the default and counted, and the tenant pleaded in bar. Br. Saver Default, pl. 24. cites 39 E. 3. 28.

12. At the *grand cape* returned the tenant cannot say that he held the land in mortgage, and that the mortgagor had paid the money to him after the default made, and entered, &c. without saving

saving his default. Thel. Dig. 211. Lib. 14. cap. 16. S. 22. cites Mich. 39 E. 3. 36.

13. At the *grand cape in cessavit* the tenant may tender the arrearages without saving his default. Thel. Dig. 211. Lib. 14. cap. 15. S. 28. cites 40 E. 3. 40. 50 E. 3. 22. and 27 E. 3.

14. At the *petit cape* the tenant was received to shew discontinuance of process without saving his default. Thel. Dig. 211. Lib. 14. cap. 16. S. 29. cites Mich. 40 E. 3. 34. and 2 H. 5. 2.

15. And to shew that his first appearance was by attorney, where he had not any warrant of attorney, &c. Thel. Dig. 211. Lib. 14. cap. 16. S. 29. cites Trin. 43 E. 3. 19.

Thel. Dig. 211. Lib. 14. cap. 16. S. 24. cites S. C. and 20 H. 6. 2. and that so it was done, 10 E. 3. 541. 16. *Formedon*; at the *petit cape* by default after appearance, the tenant came and said that the demandant had entered upon him after the last continuance, and so abated his own writ; and because he did not save his default, *seisin* of the land was awarded and protestation entered of this entry made by the demandant to save assise for the tenant. Br. Saver Default, pl. 10. cites 40 E. 3. 43.

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17. *Præcipe quod reddat*, at the *grand cape* the tenant came and pleaded joint-tenancy with J. N. &c. ready to perform his law, and was not suffered to have the plea before the default saved; by which he waged his law of non-summons, and yet per Finch. he shall not be stopped at another time to plead jointtenancy; for in another action he shall have the view, and by consequence plead jointtenancy. Br. Saver Default, pl. 14. cites 42 E. 3. 10.

18. At the *grand cape* returned, the tenant cannot plead jointly with one not named without saving his default. Thel. Dig. 211. Lib. 14. cap. 16. S. 26. cites Pasch. 42 E. 3. 11. Hill. 8. H. 6. 37. but says Martyn denied it there, and cites 14 H. 6. 4. 33 H. 6. 24. Quære.

19. At the *grand cape* the tenant may plead non-tenure without saving his default. Thel. Dig. 211. Lib. 14. cap. 16. S. 27. cites Trin. 47 E. 3. Saver Default 26. but cites 33 H. 6. 2. 24. contra.

20. *Cessavit*, the tenant appeared at the *grand cape*, and tendered the arrearages, as the demandant had counted, and it was accepted; and it was not spoken of there, of saving his default first; quod nota; for the statute of Gloucester, cap. 4. wills, that if the tenant comes before judgment, and tenders the arrearages and damages, and finds sureties, &c. that he shall retain the land; and so it seems, that the saver of the default is only in *præcipe quod reddat* at common law, and not in actions given by statute of *cessavit*. Br. Saver Default, pl. 43. cites 50 E. 3. 22.

21. At the *petit cape* returned, the tenant said, that he held for term of life of one A. which A. is dead, and he in reversion has entered, &c. without saving his default, and admitted a good plea, and issue taken thereupon. Thel. Dig. 211. Lib. 14. cap. 16. S. 30. cites Mich. 7 R. 2. Saver Default, 30.

Br. Re-summons, pl. 6. cites S. C.

22. *Formedon, petit cape* issued, and after the parcel was put without day by demise of the King, and re-summons was sued, and the tenant made default, and *grand cape* issued, returnable, &c. at which day he made default, and the demandant prayed *seisin* of the land,

land, and the tenant tendered his law of non-summons; Read said, he ought to save the first default upon the petit cape. But per Cur. he need not; for the parol was without day by demise; and there per Cur. if petit cape was awarded in a franchise upon conuſance of a plea granted, and the demandant ſues a re-summons for failure of right there, &c. the tenant ſhall not ſave this default; and after the attorney waged his law and was received. Br. Saver Default, pl. 16. cites 2 H. 4. 8.

23. *Præcipe quod reddat*, the tenant waged his law of non-summons, and at the day caſt protection, and after the re-summons is ſued, the tenant ſhall not be compelled to ſave his firſt default; per Culpepper J. Br. Saver Default, pl. 18. cites 12 H. 4. 14.

24. *Præcipe quod reddat* againſt two, the one made default after default, and the other appeared at the grand cape, and pleaded jointenancy with a ſtranger not named, and to ſave his default, tendered his law of non-summons; in this caſe the demandant ſhall not count againſt the tenant before he has ſaved his default. Br. Saver Default, pl. 25. cites 14 H. 6. 3.

25. *Præcipe quod reddat*, the tenant pleaded jointenancy with a ſtranger at the grand cape, and tendered his law of non-summons. Per Newton, he ſhall not plead the jointenancy before he has ſaved his default, but firſt he ſhall ſave his default, and after he ſhall plead jointenancy in a new action. Per Chaunt. no; for this ſhall be eſtoppel to us, if we wage our law of non-summons, as ſole tenant. But Juyn, and all the Juſtices held, that he ſhall have the view in a new writ, and therefore he may plead jointenancy; for this is a plea which goes upon the view; quod nota, that the *ley-gager* of non-summons is always before the view, therefore he ſhall have the view in the new writ, and by conſequence the jointenancy. Br. Saver Default, pl. 26. cites 14 H. 6. 4.

26. *Præcipe quod reddat*, againſt two who made default at the summons, and after came at the grand cape and tendered to wage their law of non-summons, and at the day, &c. the one came and ſaid, that his companion is dead, and he is ready to perform his law; and by the beſt opinion there, he ſhall not plead this to the writ before he has ſaved his default; for Fortescue ſaid, that a man ſhall not ſay upon the grand cape, that the ſame demandant has taken baron after the laſt continuance, nor that the demandant has entered after the laſt continuance; for thoſe pleas prove that the writ is only abatable. But to ſay that one of the demandants is dead, proves, that the writ is abated, which he ſhall have before his default ſaved; for if the tenant does not plead it, but ſuffers judgment, he ſhall have writ of error after, by which the other grants averred the liſe of the other at ſuch a place; quære of the matter ſupra? for the ſame law ſeems to be of the death of one of the tenants, and of an entry pending the writ; but taking of baron, diſſimuler, falſe-latin, &c. are otherwiſe. Br. Saver Default, pl. 6. cites 20 H. 6. 2.

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Contra, per all the Juſtices, that he ſhall have the plea without ſaving his default; for by death the writ is abated in fact, and therefore the default, is ſaved; and if they give judgment, and the tenants, this ſhall be error. Br.

Saver de Default, 38. cites 21 E. 4. 30. — But it was touched, whether they ought to plead the death after the laſt continuance, or no; for per Brian, be the death before the laſt continuance or after, the writ is abated in fact. Ibid.

27. *Præcipe quod reddat against two at the grand cape he may plead non-tenure*, without saving his default; for he need not save his default when he has nothing in the land; for then he cannot lose his land; per Prisot, in a nota; quære. Br. Saver Default, pl. 40. cites 33 H. 6. 2.

28. *Præcipe quod reddat*, the tenant after two defaults upon the original, and upon the grand cape shewed matter to save the default upon the grand cape, and ill, per tot. Cur. because he did not save the first default also. Br. Saver Default, pl. 28. cites 38 H. 6. 12.

29. *Dower against two, at the grand cape the one made default, the other appeared and said that he was tenant of the whole jointly with N. not named in the writ absque hoc, that he who made default for any thing bad, and tendered his law*; per Jenny and Pigot, he shall not have the plea of the jointenancy, but ought first to save his default, and in a new writ he may plead this plea. Brian, Littleton, and Neale, contra, and that the tenant cannot do otherwise, as here; for otherwise the demandant shall recover the moiety against him who made default, and in a new writ the tenant shall be estopped to say, but that the other was tenant with him by reason of his general ley-gager of non-summors. Br. Saver Default, pl. 35. cites 12 E. 4. 1.

30. *Præcipe quod reddat against two, who made default, and grand cape issued, and at the one came and said, that after their default the other is dead*; judgment of the writ; and per Briggs he shall have the plea before the default saved, for this plea proves the writ abated in fact. *Contra*, of entry into the land after the last continuance, coverture and taking of baron, &c. Saver Default, pl. 37. cites 21 E. 4. 16.

31. At the *petit cape* returned, the tenant shall plead outlawry in the demandant after the last continuance without saving his default. Thel. Dig. 211. Lib. 14. cap. 16. S. 31. cites Mich 14 H. 4. 15. But says, the contrary is said, Mich. 20 H. 6. 2. Saver Default, 5. Where at the grand cape returned against two, the one came and said that the other is dead and waged his law of non-summors, but it was held that the plea was good without waging his law; for if the demandant accepts the law, the writ shall abate, and if he says nothing it shall abate, but it was granted that in such case the tenant shall plead the death of one of the demandants without waging his law, &c. and says see 21 E. 4. 19. 95. agreeing.

32. In *præcipe quod reddat*, the tenant may plead a release of all the right before the default saved. Br. Saver Default, pl. 38. cites 21 E. 4. 80.

33. And by some the same law of a release of all actions; for where the action or right is released, the demandant cannot recover. *Contra* of pleas, which prove the writ to be only abatable as taking of baron after the last continuance, entry into the land, jointenancy, &c. Ibid.

(E. a) Saved in Plea Real.

By what Appearance.

1. **P**RÆCIPERE quod reddat against baron and feme; protection quia profecturus was cast for the baron, and immediately innotescimus was cast, by which the protection was annulled, and therefore it was awarded by advice of all the justices, that this shall turn the tenants into a default; and so see that such protection shall not save the default. Br. Saver Default, pl. 27. cites 1 H. 6. 6.

2. Formedon against baron and feme, the feme was received in default of her baron, and pleaded to issue, and at the Nisi Prius she made default, and at the day in bank the demandant prayed seisin of the land, and had it, notwithstanding that the feme tendered to save her default by floods of water; per tot. Cur. she cannot save this default by this means, nor any other, because immediately upon the default she is out of the court, and so the demandant recovers. Contra of the tertenant. But here she was as tenant by rescite; for as tertenant she and her baron made default before, upon which default now the land shall be lost. Br. Saver Default, pl. 22. cites 22 H. 6. 13.

3. Note that if the vouchee makes default at the summons, and after appears at the grand cape, he shall not save the default, but may enter into the warranty and plead, and the same law of him who makes default at the summons and pone in quare impedit, writ of mesne or action of waste, and appears at the distress, he shall not save the first default. Br. Saver Default, pl. 7. cites 27 H. 6. 8.

(F. a) Judgment.

How the Judgment shall be.

1. **W**HERE some of the demandants appear, and some not, and the tenants make default after default, and the process shall serve against the tenants, and the summons ad sequend' simul against some of the demandants. Br. Process, pl. 175. cites 13 E. 3. and Fitzd. Grand Cape 15.

2. Petit cape was awarded upon default of the tenant in scire facias after being joined between the plaintiff and the tenant, quod nota, which is the process upon default after appearance in scire facias. Br. Process, pl. 185. cites 42 E. 3. 2.

3. In assise of nuisance if the defendant had the view, and after is efforced, and then makes default, the plaintiff shall not have distress ad respondend. to the plaintiff, and to the default also in lieu of petit cape, but distress ad respondend. parti only. Br. Process, pl. 124. cites 42 E. 3. 9. [487]

4. The same law in quod permittat. Ibid.

N n 2

5. In

Default.

5. In debt; per Prisot clearly, where the *tenant imparls in prapice quod reddat*, and after makes default, seisin of the land shall be awarded, and not petit cape, but upon other default after appearance petit cape shall issue. Br. Saver Default, pl. 30. cites 38 H. 6. 33.

6. *Formedon*, the tenant appeared and vouched, and the vouches entered into the warranty and vouched over, by which summons ad warrantizandum issued, and the sheriff returned him summoned, and he made default, by which issued grand cape ad valentiam; and Pigot offered to appear and plead for the vouches; per Brian Ch. J. if you will not save your default at the grand cape, you shall lose your land. Pigot e contra. Br. Saver Default, pl. 36. cites 19 E. 4. 3.

7. Note that if parties are at issue to save the default of the tenant which passes for the tenant, the judgment shall be that the writ shall abate; quod nota; per Cur. Br. Saver Default, pl. 49. cites 10 H. 7. 21.

8. In debt or trespass, if the defendant appears upon the exigent, and has dies datus, and after makes default, distress shall issue, and if he be returned nihil, three capias's and exigent shall issue again, quod nota; per Cur. Br. Default, pl. 1. cites 19 H. 8. 6.

9. In writ of false judgment the defendant after appearance made default, grand distress issued against him; and if he made default at another time, or came and would not save his default, the plaintiff shall have judgment to recover seisin of the land. Br. Saver Default, pl. 44. cites F. N. B. fo. 19.

10. A quo warranto is brought in B. R. The defendant being summoned, makes default; and another default at the return of the venire facias; judgment shall be, that the franchise shall be seized into the King's hands; and not that it shall be forfeited; for it does not yet appear whether there be cause of forfeiture. No man shall finally lose his land or his franchise upon any default, if he has never appeared. By the judges of both benches. Jenk. 141. pl. 91.

11. Two nichils returned upon a scire & alias scire facias amount to a sciri feci; whereupon if the plaintiff give a rule, and the defendant doth not appear, the plaintiff shall have his judgment quod habeat executionem by default. But where a man hath a release, or any other matter which he might have pleaded, there he shall not be absolutely concluded without a sciri feci returned; for after two nichils he may have his writ of quidam querela; which he cannot have after the return of a sciri feci. L. P. R. 86.

(G. a) Recovery by Default. What is; and pleaded How.

1. IN pleading a recovery by default, the party ought to aver that he against whom, &c. was tenant of the land; and therefore it seems that the other may have answer to it without being

Default.

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Being put to writ of error. Br. Judgment, pl. 63. cites 19 Aff. 4.

2. Every recovery upon departure in despite of the Court, is a recovery by default. Br. Recovery, pl. 1. cites 26 H. 8. 8. per Fitzh.

For more of Default, See *Essoign, Non suit, And other proper Titles.*

Defeasance.

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(A) *What Persons may make it.*

Fol. 39^o.

[1. IF an obligation be made to a prior, his defeasance is a good discharge *without the convent*, without an averment that the thing in the defeasance was for the advantage of the house. 47 E. 3. 23. b. adjudged, for it is in nature of an acquittance.] Br. Defeasance, pl. 8. cites S. C. For as the prior had power to make an acquittance, so he had likewise to make a defeasance; quod nota; for it is only a chattle or action personal.

[2. If a statute be acknowledged to *baron and feme*, the defeasance made by the baron is a good discharge. 48 E. 3. 12. b.] Br. Defeasance, pl. 3. cites S. C.

[3. So where a statute is acknowledged to *two*, and *one makes a defeasance*, it is a good discharge. 48 E. 3. 12. b.] Br. Defeasance, pl. 3. cites S. C.

(A. 2.) Defeasance where Good.

1. A MAN granted a rent in fee and after the grantee and another made a grant to the grantor, that if he, the same grantee, brought such writ against the grantor, that then the rent should cease; this is a good grant, and upon this the grantor after an assise passed against him by default for the same, the grantee of the same rent brought certificate of assise, and it well lies, and the grant good, and it seems to be good reason, for the grantee may release his rent, and therefore he may determine it by his grant. Br. Grants, pl. 163. cites 32 Aff. p. 1.

2. If a man makes a *simple feoffment*, or simple release and after the other grants to him, that if he pays him 10l. such a day, that the feoffment
Br. Grants, pl. 79. S. C.

feoffment or release shall be void, this is not good, for this cannot restrain the simple deed that was made before, so if he grants to the other to re-enter. Br. Grants, pl. 139. cites 43 Aff. 44.

Br. Grants,
pl. 79. S. C.

3. *But if one, who has warranty of land from me, grants to me, that if he be afterwards impleaded, that he will not vouch, nor rebut by this warranty*; this is a good grant, for it is a thing executory, but the feoffment and release before were executed. Br. Grants, pl. 139. cites 43 Aff. 44.

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Br. Grants,
pl. 139.
cites S. C.
and S. P.

4. If a man grants by deed to his tenant for life that he shall not be impleaded for waste, and after the tenant grants to the lessor that he will not plead his deed in an action of waste, nor will not have action thereupon, this is a good grant, for it is of a thing executory, and of a thing of which the force cannot be taken, but by action taken. Br. Grants, pl. 79. cites 43 Aff. 44.

5. If a man grant to me that if he does not pay to me 100l. at such a day, that I may enter into his land, there if he does not pay, yet I cannot enter; per Perle. Br. Grants, pl. 79. cites 43 Aff. 44.

6. If the disseisee release to the disseisor, and after the disseisor grants to the disseisee by deed, that if he be impleaded by the disseisee that he will not plead the release; this is good grant, for the pleading is a thing executory. Br. Grants, pl. 79. cites 43 Aff. 44. per Wich. and Perle.

7. Debt upon a single obligation, the defendant pleaded defeasance of the plaintiff by deed poll and good; though it was not indented, for it is the deed of the plaintiff, which suffices, quod nota. Br. Defeasance, pl. 12. cites 7 E. 4. 29.

8. If a man pleads defeasance in debt upon an obligation of a thing to be done beyond-sea, which cannot be tried here, or in two counties, as London and Wiltshire, where the one cannot join with the other, so that trial cannot be had, this is void and the obligation is single. Br. Defeasance, pl. 13. cites 22 E. 4. 2.

S. C. cited
by Price J.
Gilb. 75. as
an authority
not to be
shaken.

9. Debt upon an obligation of 200l. the defendant pleaded, that after the obligation made, the plaintiff by indenture covenanted, that if he paid 100l. such a day the obligation should be void, and alleged that he paid it at the day; it was the opinion of the Court it was a good plea, and the defendant shall not be put to his action of covenant by circuitry of action, but that the plaintiff shall be barred. Cro. E. 623. pl. 16. Mich. 40 and 41 Eliz. B. R. Hodges v. Smith.

S. C. cited
per Cur.
Carth. 211.
Hill. 3 W.
& M. in
B. R. —
S. C. cited
per Holt,
Ch. J.
Show. 334.

10. B. acknowledged a statute to S. and sold lands in the county of H. to T. afterwards the land in H. in the hands of T. were extended by the statute. B. brought audita querela on a defeasance, viz. that if the land in H. should be extended by the statute, then the statute should be void. Adjudged that the defeasance was good and not repugnant; for he might sue execution of land in another county, or of his goods or person. Mo. 811. pl. 1097. Mich. 8 Jac. in Canc. Trot v. Spurling.

11. Defeasance must contain proper words of defeasance, as that the thing should be void. 2 Salk. 575. pl. 2. Hill. 10 W. 3. B. R. in that of Lacy v. Kinafton.

12. A record of a judgment is defeasible by bond or deed, per Holt Ch. J. 12 Mod. 229. Mich. 10 W. 3. Anon.

(B) To whom it may be made.

[1. **I**F the obligee afterwards by indenture between him and a stranger grants, that if a stranger performs certain conditions, then the obligation shall be void; this is no good defeasance, although the stranger perform the conditions, because the obligor is a stranger to this indenture, and therefore cannot put it in trial. Dubitatur, 3 H. 6. 18. b. 26. b.]

Br. Estranger al fait, &c. pl. 1. cites S. C. that the best opinion was, that the obligor shall not plead it. — Fitzh. Debt, pl. 13. cites S. C.

(C) Of what Things.

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[1. **I**F a man makes a feoffment with warranty against all men, and the feoffee by collateral indenture regrants for him and his heirs, that if the feoffee be vouched by force of the warranty, then the warranty should be void, this is good defeasance of the warranty. 7 H. 6. 34. by all the justices.

For he may rebut, but not vouch afterwards. Br. Defeasance, pl. 4. cites 7 H. 6.

43. — [In the Year Book it is 43. b. 44. a. pl. 21. and Roll seems to be misprinted.]

[2. If a man releases all his right to another, and the releasee after grants, that if the releasor does such a thing, the release shall be void; this is not a good defeasance to avoid the release. Contra, * 17 Aff. 2. || 7 H. 6. 34.]

* Br. Condition, pl. 1. 103. cites S. C. — Fitzh. Conditions, pl. 14. cites S. C.

|| Br. Defeasance, pl. 4. cites 7 H. 6. 43. and see the notes to pl. 1. supra

3. In assise the tenant pleaded release in barr, and in defeasance of it the other pleaded payment and tender of the money by force of the condition which he shewed in specialty. And note that the common opinion there was, that simple release may as well be avoided by deed, &c. as charter of the feoffment, obligation, recognizances, statutes, &c. But Shard contra, and there the plaintiff recovered, and therefore the release is defeasible by the deed of defeasance; quod nota. Br. Defeasance, pl. 6. cites 17 Aff. 2.

Br. Conditions, pl. 103. cites S. C. Brooke says, and therefore it seems that the release and defeasance were delivered uno instanti. But Cave. if the release be first delivered as appears in libro Perkins, fol. 138. 139. For by him if the indenture and release be delivered simul et semel, then good. — And so if the condition be comprised in the release, if the release be by deed indented, quod vide ibidem. Br. Conditions, pl. 103.

4. A man made simple feoffment, and after by deed rehearsing it, the feoffee granted to the feoffor, that if the feoffee pay 10l. by such a day, that the deed and feoffment shall be void. Tanks said defeasance can be of no effect of lands which pass by livery, if the livery be not made as well upon the defeasance as upon the charter of feoffment, and the opinion of the Court was with him. Br. Conditions, pl. 113. cites 30 Aff. 11.

See tit. Con-
ditions (S)
per totum.

(D) At what *Time* it may be made.

Cro. E. 837.
pl. 11. Gage
v. Shirland.
S. C. adjud-
ged accord-
ingly, and
cites 19 H.
6. 23. [1. **I** F a defeasance be made to avoid a judgment before the judg-
ment given; this is not good to be pleaded in a scire facias
to have execution, though such judgment be confessed upon an
agreement when the defeasance was made. Trin. 43 El. B. R.
between Gage and Shurland, per Curiam.]

And they said, his remedy is only by way of covenant upon his indenture. The covenant was, if he obtained judgment, and that the defendant on such a day paid him 100l. that he would not sue execution, and that the judgment should be void; and pleaded, that he paid the 100l. accordingly.

[491] 2. If a defeasance of a statute be made, and after another defeasance is made, the first defeasance is made void thereby, and the second only in force, as in a will. Pasch. 8 Jac. B. agreed.]

Br. Affse,
pl. 227.
cites S. C.—
Br. Debt,
pl. 133.
cites S. C.
—S. C.
cited 6 Rep.
13. b. 3. In assise the tenant shewed how he was bound to the plaintiff in a statute merchant, and that the plaintiff had sued execution and had execution delivered to him of this land by the sheriff, and after execution the plaintiff by deed granted to the defendant to enter, by which he entered, and after covenant was had between them, that if the defendant shall pay 20l. to the plaintiff that the recognizance shall be nul, and shewed an acquittance of payment of 8l. in part of payment of the debt of 20l. and the other demurred because it cannot be intended in part of payment thereof: for now by the execution it is no debt, and then it shall be intended for another debt, for the debt of the statute is extinct by the execution, and the opinion of the Court was contra, and that it is a good bar. And so see a good defeasance of the statute after that execution was sued and executed, quod quere without words that execution shall be void. And Brooke says, it seems to him that by the first entry it is in law a surrender. And after the plaintiff said, that this 8l. was for another debt, and not for the debt of the statute, and because he did not shew any cause of other debt, this bar was good, and the plaintiff was barred by judgment. Br. Defeasance, pl. 7. cites 20 Aff. 7.

4. If I grant to you that if you be obliged to me in 20l. by obligation that the obligation shall be void, and after you are obliged to me in 20l. yet the defeasance is void; for there was no such obligation at the time of the making of the defeasance, quod Fortescue concessit. Br. Defeasance, pl. 5. cites 19 H. 6. 62.

5. An estate once made shan't be defeated by a defeasance made after the estate. Arg. Pl. C. 133. 6 E. 6. in case of Browning v. Beston, and cites 5 E. 3. where it is held that if a feoffment is made and the feoffee afterwards at another time makes a defeasance, viz. that if the feoffor does such an act, that then the livery and seisin and his estate shall be void; this shall not defeat the estate first vested.—And so where W. borrowed of R. 40l. and in surety of payment infeoffed R. of his land in fee on condition, that if he paid the said sum at the day assessed, then the feoffment should lose its force. W. did not pay all the day, but afterwards died and his wife took to baron

between one B. who by agreement between him and R. paid the money to R. whereby B. had the land, and afterwards R. died and his wife brought writ of dower; and it was adjudged that she shall have dower, because the estate of R. was not avoided or defeated by the agreement made after the condition broken. Pl. C. 133. a. b. cites it is so held 42 E. 3. 1.

6. A new defeasance may be made to an obligation with condition, but then it must be by writing; agreed per Cur. Mo. 573. pl. 789. Hill. 41 Eliz. in case of Holford v. Andrews. Mod. 811. in pl. 1097. S. P.

7. A. covenants with B. that if he obtains judgment against B. and B. on such a day pay unto him 100l. that he would not sue execution, and the judgment should be void, in sci. fa. on the judgment payment of the 100l. is no plea; for a defeasance can't be made of a judgment before the judgment is given, and cites 19 H. 6. 62. and B. has no remedy but by writ of covenant on his deed. Cro. E. 837. pl. 11. Trin. 43 Eliz. B. R. Gage v. Shurfland alias Thurland.

8. There is a diversity between inheritances executed, and inheritances executory; as lands executed by livery, &c. cannot by indenture of defeasance be defeated afterwards. Co. Litt. 236. b. ad finem.

9. And so if a disseisee releases to a disseisor, it cannot be defeated by indenture of defeasance made afterwards; but at the time of the release of feoffment, &c. The same may be defeated by indenture of defeasance; for it is a maxim in law, *Quæ incontinenti fiunt in esse videntur*. Co. Litt. 236. b. [492]

10. But rents, annuities, conditions, warranties, and such like that be inheritances executory may be defeated by defeasance made, either at that time, or at any time after; and so the law is of statutes, recognizances, obligations, and other things executory. Co. Litt. 237. a.

11. Debt upon bond, the defendant pleaded, that after making the bond, viz. on the same day the plaintiff made a defeasance, by which he promised, that if before such a day he did not produce witnesses, to prove that the money mentioned in the condition was a true debt, and that the defendant, before the making the bond, had promised to pay it, then the bond should be void, &c. And averred, that the plaintiff did not produce any witnesses, &c. And upon demurrer to this plea, judgment was given by Twisden (Rainsford and Morton, J. saying nothing, and Keeling being absent) for the plaintiff, because the defendant had pleaded a defeasance made after the making the bond, and such defeasance cannot make the bond void; for it ought to be made at the same time, or eodem instante the bond was made. 2 Saund. 47. Hill. 21 and 22 Car. 2. Fowell v. Forrest.

But Saunders says, the law is clear to the contrary, (viz.) That a bond, judgment, or statute, may be defeated by a defeasance, made afterwards, as is the common practice, and cites Co. Litt. 237.

and Cro. E. 755. For a defeasance is but a conditional release, and a release is an absolute defeasance; and the difference is between a thing vested, and a thing executory; as in a feoffment of land, the condition ought to be contained in the same deed, or in another sealed at the same time, otherwise it is void; because by the feoffment, the estate of the land is executed in the feoffee; but a bond or judgment are but executory, and may be released or defeated at any time by a deed sealed, though not dated at the same time with the bond or judgment, and says, this is clear law without any doubt or ambiguity, though on a sudden the Court erroneously mistook it, and gave judgment as before. 2 Saund. 47. Hill. 21 & 22 Car. 2. B. R. Fowell v. Forrest.

Defeasance

Defeasance of a bond may be *after the money is due*, as well as before, and such suspension of the action will not destroy the bond. Per Holt Ch. J. Cumb. 123, 124. Trin. 1 W. & M. in B. R. Anon.——Carth. 63, 64. Ayloffe v. Scrimphire. S. C. & S. P. and cited 3 H. 6. 18. b. Co. Litt. 207. 291. Cro. E. 755. and 2 Saund. 47, 48.

(E) To one. In what Case it shall be to others.

Ld. Raym.
Rep. 690.
S. C. & S. P.
by Holt Ch.
J. in deli-
vering the
opinion of
the Court.

1. IF a defeasance be to one of the parties, it is to all, for if several *covenant jointly and severally*, a defeasance to one of them is a defeasance to all; and it is impossible to defeat as to one, without defeating as to all; and if a defeasance *works a release and discharge*, a defeasance to one is a defeasance to all, as a release to one is a release to all. 12 Mod. 550, 551. Trin. 13 W. 3. Lacy v. Kynaston.

(F) What amounts to it.

1. IF a man grants a rent to J. S. in fee, and the grantee by another deed grants to the grantor, that if the same grantee brings such an action against the grantor, that the rent shall cease; this is no condition, but it is a good defeasance, and shall serve as well as a condition. Quod nota. Br. Condition, pl. 235. cites 32 Aff. 1.

[493] 2. If A. releases to B. all his right in the land which B. has by disseisin made to A. and after B. grants to A. that if he pays 10l. at such a day, that the release shall be void, and he may re-enter; this shall not void the release, because the right goes simply before, but it seems clear, that if the condition had been in the release, that then the condition had been good. Br. Releases, pl. 39. cites 43 Aff. 12. per Cur. And the same year, pl. 44. accordingly.

3. Where release is simple, and indenture of defeasance comprehends a condition in fact also upon it, there if the release and indenture of defeasance are delivered *uno instanti*, this is sufficient upon the performance of the defeasance to defeat the release, per Tresilian and Wich. quod Curia non negavit. Br. Releases, pl. 39. cites 43 Aff. 12.

4. If a man be bound in an obligation of 100l. and the obligee grants to him by his deed, that he will not sue him, he shall plead this in barr, in lieu of the release, per Martin; and per Babington he shall have thereof action of covenant if it be by another deed, and if it be contained in the same obligation, then it is void; and Brooke says, it seems to be law that it is void in fact in the same deed, for it is repugnant, and shall void all the force of the obligation; but by another deed, a man may discharge it as well by grant as above, as by release, as it seems clearly. Br. Defeasance, pl. 4. cites 7 H. 6. 43.

* Br. De-
feasance, pl.
15. cites
S. C. and
Brooke.

5. Debt upon obligation, the defendant pleaded a grant of the plaintiff, made to him after by deed, that he should not be sued, vexed, nor troubled upon the obligation * before Mich. and that, if he be impleaded, that he should plead the grant as an acquittance, and

and that the obligation should be void, and per Coningsby and Eliot, it is a good bar, and it is a release in the law; and a release of actions, or of right for an hour, is so for ever. But per Moore and Tremayle to the contrary, and that it was a sparing for the time, but no release. And Fineux Ch. J. to the same intent at first, and that it sounds only in covenant, and that if the party break the covenant, he shall have only an action of covenant. But after Fineux changed his opinion. Br. Barre, pl. 52, cites 21 H. 7. 23.

says, that the best opinion was, that it is a good defeasance in bar of the action, by reason that a personal action once suspended, is gone for ever.

ever; but that it is said, that it cannot enure as a release or acquittance, but as a defeasance [by those words, viz. that he should not be sued, &c. before Mich.]

But where the obligee granted by deed, that the obligor should be acquitted and discharged of the debt, or if he be vexed or sued, that the obligation should be void, and be as an acquittance, the best opinion was, that the debt was gone, and that this was a good acquittance, and that the words (if he be vexed or sued, it shall be void,) do not make a condition; for the debt is discharged by the first words, and the said last words came too late. Br. Defeasance, pl. 16. cites 21 H. 7. 23.

6. And per Fineux, there is a difference between a defeasance of an obligation, and a condition of an obligation; for if a condition be repugnant to the obligation, it is void, and the obligation good. As if the condition be, that he shall not sue the obligation, this is a void condition; so of a feoffment, upon condition that he shall not take the profits, the condition is void, but here is a grant to defeat the obligation, and it is good by way of defeasance, though it be repugnant to the obligation, and therefore by him this grant made the obligation void, and so Fineux, Coningsby and Elliott, contra Tremayle and Moore. Br. Barre, pl. 52. cites 21 H. 7. 23.

7. There is a great difference between a promise not to sue, and a promise to forbear to sue; for the first excludes him from suing at all, but the last is only for a time. Per Periam and Fleming Ow. 110. Pach. 36 Eliz. in Cam. Scacc. in case of Sackford v. Philips.

8. And per Walmsley, there is a difference where the words are spoke by plaintiff, and where by defendant. For if plaintiff says, I will forbear to sue you, if you will promise to pay me, and upon this the defendant makes a promise accordingly; the plaintiff ought never to sue. But if defendant only speaks the words, if you will forbear to sue; I will promise to pay you, and the plaintiff agrees, and forbears for a time certain, yet he may have his action afterwards. Ow. 110. in S. C.

[494]

9. A. was in execution on a statute merchant, at the suit of B. A. shews certain articles between him and B. to discharge him of the statute, and prays to be bailed, but denied; and per Cur. one in execution ought not to be bailed on a surmise, and the articles are not sufficient to discharge him of the execution. But his remedy is to have an action of covenant upon them. Cro. J. 218. pl. 7. Hill. 6 Jac. B. R. Beeston v. Robinson.

10. B. [the plaintiff] and M. were bound to K. and K. makes a bond to M. in the sum of 100l. that if M. be not sued upon the first bond, then the bond of K. to M. shall be void; the plaintiff alleged, that K. did both sue him and M. and that he had no notice of the second bond, that he might have pleaded it, and so pretends,

pretends, that the second bond should be a defeasance of the first; and judgment was given for the defendant. Brownl. 29. Trin. 13 Jac. Bird v. Kirton.

11. If I grant to one against whom I have cause of action, that I will not sue him within a year, this is no suspension of the action. Bridgm. 117. Trin. 15 Jac. in case of Lee v. Wood, cites it as said per Brudenell, 21 H. 7. 30. in John de Pufeto's case, upon which it is inferred, that it is to be observed, that I may sue, and the other is put to his action of covenant.

Show. 330. Carvil v. Edwards. S. C. argued; and by Holt Ch. J. this is no release, but a defeasance; and said, the quære is, if here be an acknowledgment of satisfaction; adjournatur.

2 Salk. 573. S. C. & S. P.

If two be bound jointly and severally in a bond, and a release is made to one of them, it releases the several as well as the joint lien. Per Holt Ch. J. 12 Mod. 415. Lacy v. Kynaston.—Ibid. 551. S. C.

Ld. Raym. Rep. 690. S. C. & S. P. Per Holt Ch. J. in delivering the opinion of the Court.

A. is bound by bond to B. and B. covenants not to put it in suit till such a time, it is a defeasance; but if he grants not to sue upon it at all, it is a release. Per Holt Ch. J. 12 Mod. 415. Lacy v. Kynaston.

But a defeasance to a stranger is not good. As if A. be bound to B. in a certain sum, and B. covenants and grants with C. a stranger to the bond, that if A. did such a thing, the obligation should be void, and held, that it could not be a good defeasance. 12 Mod. 551. In case of Lacy v. Kynaston, cites 34 H. 8. Br. Edranger al fait, 31.

[495] 16. Indenture made by A. and B. to save C. harmless, is not a defeasance of a covenant, wherein A. is bound to pay C. a sum of money. 12 Mod. 548. Trin. 13 W. 3. Lacy v. Kynaston.

17. Where a deed intends mutual remedies, it is not to be construed a defeasance. 12 Mod. 550. In case of Lacy v. Kynaston.

18. The nature of defeasance is, that upon condition performed, or

or upon such and such terms, the thing to be defeasanced is to cease. 12 Mod. 550. In case of Lacy v. Kynaston.

19. A man made a feoffment in fee with warranty against all persons, feoffee by his covenant, grants and agrees not to take advantage of this warranty, and then he is impleaded and vouches the feoffor, he may plead his covenant in bar of the warranty; but if the covenant had been not to bring a warrantia chartæ, or not to vouch, then it had been a covenant only, and the covenantor hath other remedy and use left him of his warranty; and the covenant would not be a release in that case, because it does not exclude all his remedy upon the warranty. 12 Mod. 552. Trin. 13 W. 3. In case of Lacy v. Kynaston.

S. P. Br. Defeasance, pl. 4. and that notwithstanding this covenant, the feoffee may well rebut, cites 7 H. 6. 43.

20. A. covenants with B. to pay him 300l. for the use of A. only for her life; and covenant was brought upon this and breach assigned, that there was so much of the 300l. arrear; defendant pleads, that there was another indenture between him and the plaintiff since the date, or delivery of the covenant-deed declared on reciting the said covenant and agreement for the payment of the 300l. wherein it was covenanted and agreed, that so long as A. and his wife did co-habit, the payment of the 300l. should cease, and avers that they did co-habit for the time the said arrear became due and pleads this in bar of the first agreement; and there are express words that the payment should cease during the co-habitation and there had been no great harm to construe this as a release of the arrearages during the co-habitation; but yet it being a sum in gross, and the covenant temporary, and not perpetual, they held it no good bar. Per Holt Ch. J. 12 Mod. 552. Trin. 13 W. 3. cites 2 Vent. 217. Gawden v. Draper.

S. C. cited by Holt, Ch. J. Ld. Raym. Rep. 691. and said that it was a sound judgment. — But he said, if it had been a rent for years, and a covenant or agreement by the lessor to lessee, that it should not be paid or that should cease

for such a time, that would amount to a grant of the rent for so long, and it would in that case cease and revive again, but this was a sum in gross; and though it was defeasible, yet because it was not entirely defeasanced, they would not allow a subsequent temporary agreement to be a release of it, Per Holt Ch. J. 12 Mod. 553. In case of Lacy v. Kynaston.

21. In debt on an obligation, the defendant pleaded in bar, that it was given for compounding felony; on a demurrer it was insisted, that this was contrary to the import and condition of the bond, and after some doubts it was adjudged per tot. Cur. for the plaintiff; and by Fortescue a parol agreement can no more be set up against a bond, than a parol defeasance can against a single bill. Gibb, 75. Trin. 2 & 3 Geo. 2. C. B. Andrews v. Eaton.

(G) Pleading.

1. **W**HERE debt is brought upon an obligation of 100l. the plaintiff shews the indenture of defeasance proving it, and not the obligation, the action lies not, per Belke. Br. Monstrans, pl. 38. cites 42 E. 3. 18.

2. In debt the defendant pleaded defeasance to discharge the plaintiff of 100l. against A. B. that then, &c. He ought to shew how he has discharged him by release, acquittance, payment, or otherwise,

otherwise, per Judicium. Br. Dette. pl. 204. cites 35 H. 6. 10.

S. C. cited
by Holt Ch.
J. Carth.
64.—S. P.
held per
Cur. accord-
ingly. Co-
myns's Rep.
568. Trin.
11 Geo. 2. C. B. Trevel v. Angus.

*3. Where a bond is made, and after a defeasance is made thereof, if he pays a lesser sum, &c. there if he pleads the defeasance and the tender of the lesser sum, he needs not say *tout temps prist*; for by the tender he was discharged of all. But otherwise of an obligation with condition to pay a less sum. Cro. E. 755. pl. 16. Pasch. 42 Eliz. C. B. Cotton v. Clifton.

4. Debt upon bond conditioned to pay several sums on several days, the defendant pleaded payment of all the sums due before such a day, at which day the plaintiff per scriptum suum signed under his hand, which the defendant profert hic in curia, agreed to defer the payment of the residue till a farther day not yet come; and upon a demurrer to this plea, it was adjudged ill, because this action being founded on a deed, there cannot be a defeasance made thereof without a deed, and scriptum sub manu doth not imply a deed. 3 Lev. 234. Trin. 1 Jac. 2. C. B. Blemerhaffet v. Pierfon.

Id. Raym.
Rep. 421.
S. C. and
the whole
Court held
that where
the proviso is by way of defeasance it ought to be pleaded by him that takes advantage of it.

5. Where a proviso goes by way of defeasance of a covenant, it must be pleaded on the other side, otherwise, where by way of explanation, or restriction of the covenant; per Holt Ch. J. 2 Salk. 574. pl. 2. Hill. 10 W. 3. B. R. Cleyton v. Kinafton.

6. A. entered into a bond to B. conditioned for payment of 40l. afterwards B. agreed and entered into a covenant, that if A. (the defendant) pay 5s. in the pound for every 20s. due to the plaintiff from the defendant, and so at the same rate, for every greater or lesser sum than 20s. on or before the 25th of December, the plaintiff should and would accept the same in discharge of all sums, as then were, or on the 25th of December should be, due from the defendant to the plaintiff. The Ch. Justice delivered the opinion of the whole Court for the defendant; that this is a defeasance to this bond and sufficiently relates to it; for it is not necessary to recite the bond, no more than where a power of revocation is inserted in a deed; a revocation by a subsequent deed is good, though it does not recite or mention the power, or in direct words refer to it. Comyns's Rep. 569, 570. Trin. 11 Geo. 2. C. B. Trevel v. Angus.

For more of Defeasance, See Conditions, Covenants, Estates, Extinguishment, Release, Uses, And other proper Titles.

* Defence.

* Defence cometh of the word (defendo) so called from the manner of the pleading viz. *Prædict* A. B. *defendit vim & injuriam*, &c. for example in a personal action brought by A. B. against

(A) In Pleadings. Necessary in What Cases.

ASSISE of nuisance *vicontiel before the justices in bank*, the defendant made defence and pleaded. Br. Defence, pl. 2. cites 46 E. 3. 23.

C. D. *defendit vim & injuriam quando*, &c. *Et damna & quicquid quod ipse defendere debet*, &c. Co. Litt. 127. b.

In *assise of nuisance*, the defendant *venit & defendit*, &c. but does not *show what*, but it seems that this shall be *intended vim & injuriam*, &c. and so note the diversity between defence in assise of nuisance and in assise of land, rent, and the like. Br. Defence, pl. 19. cites 46 Ass. 9.

2. *Contra* it seems before *justices of assise*; for the pleading in assise of nuisance before justices of assise, and before the justices of bank much varies. Br. Defence, pl. 2. cites 46 E. 3. 23.

3. *Præcipe quod reddat*; at the grand cape the demandant released the default, and counted against the tenant. Rolf defended tort and force and demanded judgment, if the Court would take consuance, and pleaded ancient demesne, &c. Br. Defence, pl. 5. cites 8 H. 6. 1.

Br. Ancient Demesne, pl. 21. cites S. C.

4. Note per Fortescue, arguendo in attain, that in *assise, dower*, *per quæ servitia* and attain, a man shall not make defence, and so seems by the entries no more in assise of *mortdanceflor*, than in assise of *novel disseisin*, as it seems by the entries; and see elsewhere, that in *scire facias* the defendant shall not make defence, but the *aforsaid J. B. venit & dicit*, &c. and so pleads in bar. Br. Defence, pl. 1. cites 34 H. 6. 33.

Br. Defence, pl. 23.

5. Note, that in *assise* and *scire facias* there is not any defence. Br. Defence, pl. 10.

S. P. nor in attachment upon

prohibition. Br. Defence, pl. 22.

6. In *assise of darrein presentment*, and in assise of *mortdanceflor*, there is no defence; *contra* in assise of *nuisance*. Br. Defence, pl. 48.

7. In this defence there be *three parts* to be considered. First, *when he defends the wrong and the force*, this has a *double effect*, viz. *to make himself party* to the matter; and this is the reason that the defendant in this and the like actions can plead no plea at all before he makes himself party by this part of the defence, as it appears here by Littleton, that if the defendant will plead in *disability of the person of the plaintiff*, he must first make himself party

Coke says that a man cannot plead to the jurisdiction without making defence but this rule is not law given by

nerally un- by this part of the defence, neither can he *plead to this jurisdiction*
 stood; for a of the court without this part of the defence. Co. Litt. 127. b.
 man may come and say venit & dicit, that the lands are ancient demesne, and it is good without more saying.
 Per Powell J. Ld. Raym. Rep. 117. Mich. 8 W. 3. in case of Briton v. Graden.

In trespass of corn *8. 2dly, By the defence of the damages, he affirms that the plain-
 taken, the tiff is able to sue, and (upon just cause) to recover damages. Co.
 defendant Litt. 127. b.
 defends tort

and force, and demands judgment si curia cognoscere vult; for he says, that he is parson of B. where
 &c. and took as tithes. And sic vide, that he who pleads to the jurisdiction, shall defend the tort
 and force, but not the damages; for this will affirm the jurisdiction. Br. Defence, pl. 8. cism 39
 E. 3. 23.

9. 3dly, And by the last part, viz. *and all that which he ought*
to defend, when and where he ought, he affirms the jurisdiction of
 the Court. Et sic de similibus. And of such necessity is it for the
 tenant, or defendant to make a lawful defence as albeit he appears,
 and pleads a sufficient bar without making defence, yet judgment
 shall be given against him. Co. Litt. 127. b.

10. In pleading excommunication in the plaintiff, Hale Ch. J.
 doubted, if defendant ought not to have made some kind of defence
 though no full defence is to be made. Vent. 222. Trin. 24
 Car. 2. B. R. Jay v. Bond.

11. In assumpsit on a bill of exchange, the defendant pleaded in
 bar without defence, and upon a general demurrer this was ob-
 jected, and the question was, if this was matter of form, and so
 aided by the general demurrer. And prima facie the Court was
 of opinion, that this was matter of substance; because the de-
 fendant is not party to the action without defence; but after
 having consulted the judges of B. R. where it has been a long
 time held matter of form, they agreed that it was aided by the
 general demurrer, though at the same time they seemed to comply
 with that opinion, rather than to approve it with their own judg-
 ments, to the end that there might be a conformity between the
 two courts. Ld. Raym. Rep. 282. Mich. 9 W. 3. Bellasis v.
 Hester.

2. P. 3 Lev. 12. In ejectment the defendant venit & dicit, that the land is
 18a. Trin. ancient demesne, without making any defence; to this there was a
 36 Car. 2. special demurrer. Et per Holt Ch. J. The plaintiff might have
 C. B. in case refused the plea for want of a defence; but if he receives the plea
 of North v. he admits a defence. If one plead outlawry, he ought to plead it
 Hoyle. Per sub pede figuli, and if he does not so plead it, the plaintiff may
 Cur. and the refuse it; but if he accepts the plea he shall not demur for that
 precedents, where ancient demesne was plead-
 ed, some- 4 W. and M. in B. R. Ferrer v. Miller.
 times with

defence, and sometimes without it, prove only, that it may be well pleaded with defence, but does
 not prove that it may not be pleaded without defence; and thereupon the plea without defence
 was ruled good.

Show. 386. Ferrers v. Miller. S. C. adjudged accordingly.—S. C. cited Arg. as the case of
 Ferrer v. Miller. Ld. Raym. Rep. 117. That defendant venit & defendit vim & injuriam, (but
 quando was not in) &c. and he pleaded ancient demesne, and held good.

(B) The

(B) The Manner. And in what Actions.

1. **I**N appeal of mayhem, the defendant *defendit vim & injuriam*, *and all felonies and appeals of mayhem, and whatever is contra pacem domini regis, coronam & dignitatem suam.* Br. Defence, pl. 18. cites 40 Aff. 9. Brown's Anal. 6.
2. In trespass the defendant defended tort and force, and demanded judgment if he shall be answered; for he was his villein, and shewed how, &c. And so see that he did not make full defence when he pleaded to * the person, and did not say hæc verba quando, &c. for this goes to the damages, and is full defence. Br. Defence, pl. 21. cites 40 E. 3. 36. *[499]
In trespass he who pleaded to the person defended tort and force, but not the damages, viz. vim & injuriam, but did not say quando, &c. And so see, that he who pleads to the person shall not make full defence. Br. Defence, pl. 12. cites 35 H. 6.—Br. Nonability, pl. 47. (bis) cites 14 H. 6. 18. S. P. accordingly.
- Defence upon villenage pleaded is, quod defendens, ven. & defend' vim & injuriam, &c. and demanded judgment. Br. Defence, pl. 29.
3. In trespass, the defendant defended tort and force and protestation, that the plaintiff is his villein, pro placito that the defendant is a countess not named countess; judgment of the writ; per Fulthorp, first you ought to have made full defence, and then to take the villeinage by protestation; per Newton, no, for full defence would affirm the plaintiff a person able, and then the protestation void, and before defence a man can't take protestation; for before defence a man is a stranger to the action. But per Howster prothonotary the use has been in such case to make protestation before the defence, and then to make full defence; and June thought this form good; quod nota of protestation before defence. Br. Defence, pl. 9. cites 14 H. 6. 18. Heath's Max. 25. cites S. C. —Ibid. 26. says, that by Plowden, in case of Graystock v. Fox, in his commentaries, it is said, that a protestation is a saving or excluding
- of a conclusion, and (by that book) ought to be after the defence, which is (in that point) left doubtful by the book of 21 H. 6. 26. and may not be contrary in itself, or double. As protestando that he made no testament, pro placito, that he made not the plaintiff his executor; because if he made no testament, he could make no executor.
4. In writ of right, the form in writ is after the count rehearsed to make defence de novo, and then to vouch over or plead in bar; and the same form is where the demandant replies to the bar, the defendant ought to make defence, and then to answer to the title, &c.—Br. Defence, pl. 7. cites 21 H. 6. 26. per Newton. Heath's Max. 25. cites S. C.
5. He who pleads villenage to the person of the plaintiff or defendant cannot make full defence, but shall defend tort and force only, and demand judgment if he shall be answered. Br. Defence, pl. 11. cites Litt. Tenures tit. Villenage. Br. Defence, pl. 28. S. P.
6. In maintenance the defence is ven' & defend' vim & injur' &c. & quicquid, &c. and the same in action upon the statute of labourers; for these are actions upon statute. Br. Defence, pl. 23. Brown's Anal. 6.†
7. Vouchee defends thus, viz. Et præd' A. B. ut tenens per warr' suam defend' jus suum quando, &c. Br. Defence, pl. 24. Heath's Max. 25. cites S. C. Brown's Anal. 67.

8. In *recto de rationabili parte ven' et defend' vim, &c.* Br. Defence, pl. 25.

9. And in writ of *participatione facienda, ven' et defend' vim et injuriam quando, &c.* and not *jus suum*; for no land is in demand. Br. Defence, pl. 25. (bis)

10. In *bill of debt, ven' & defend' vim & injuriam* and does not say *quando, &c.* Br. Defence, pl. 26.

11. *Rationabilibus Estoveriis, defendant ven' & defend' vim & injuriam quando, &c.* Br. Defence, pl. 27.

12. In *action upon statute, ven' & defend' vim & injuriam, &c. & quicquid, &c. premunire fac'.* Br. Defence, pl. 30.

13. In *recaption' averiorum ven' & defend' vim & injuriam quando, &c. & quicquid, &c.* so in *forger de faits*, and in *conspiracy.* Br. Defence, pl. 31.

[500] 14. In *rationabili parte bonorum venit & defendit vim & injuriam quando, &c.* Br. Defence, pl. 32.

S. P. Br.
Defence,
pl. 32.

15. In writ of *intrusion, and every præcipe quod reddat, venit & defendit jus suum quando, &c.* and the same in *ad terminum qui præterit.* Br. Defence, pl. 33.

16. So in writ of *avowry.* Br. Defence, pl. 34.

17. In *escheat, venit & defendit jus suum quando, &c.* Br. Defence, pl. 35.

18. In *quare impedit venit & defendit vim & injuriam quando, &c.* And the same in *warrantia chartæ.* Br. Defence, pl. 36.

19. And in all *actions of contempt venit & defendit vim & injuriam & omnem contemptum & quicquid, &c.* and the same in *præmunire.* Br. Defence, pl. 37.

In detinue
of charters
the defend-

ant defended tort and force and no more, and pleaded to the jurisdiction, because the land in the charter is within the cinque ports, and it was admitted a good defence, and therefore it seems, that he shall not make full defence if he will plead to the jurisdiction, but it was not adjudged if the plea be good to the jurisdiction in this case. Br. Jurisdiction, pl. 36. cites 2 H. 6. 22. Br. Defence, pl. 4. cites 7 H. 6. 22. S. P. and seems to be S. C.

21. And in *formedon, venit & defendit jus suum quando, &c.* Br. Defence, pl. 38.

22. In *quo jure, venit & defendit vim & injuriam quando, &c.* Br. Defence, pl. 39.

In nativo
habendo, the
defendant

23. In *nativo habendo, ven' & defend' jus suum & omnem nativitatem quando,* Br. Defence, pl. 40.
defended tort and force and all manners of waste, &c. Br. Defence, pl. 6. cites 19 H. 6. 32. S. P.
—Br. Defence, pl. 16. cites S. C.

24. In *ne injuste vexes, ven' & defend' vim & injuriam quando, &c.* Br. Defence, pl. 41.

25. In *ejectione custodiæ, ven' & defend' vim & injuriam quando, &c.* Br. Defence, pl. 42.

26. In *rationabilibus divisis, ven' & defend' jus per nomen, &c. quando, &c.* Br. Defence, pl. 43.

27. *Action upon the case, ven' & defend' vim & injuriam quando, &c.* Br. Defence, pl. 44.

28. *Recto*

28. *Recto quando Dominus remisit curiam suam, ven' & defend' jus præd' patentis & seisinam ejus quando, &c.* viz. quando petens narr' de seisina propria & totum, &c. & quicquid, &c. and especially *de ten' præd' cum pertin' ut de feodo & jure, &c.* Br. Defence, pl. 45.

29. Vouchée in a count upon a writ of right of advowson makes his defence in this form, viz. *Et prædictus Thomas tenens per warrantiam suam defendit jus prædicti Simonis & seisinam suam quando, &c. Et totum, &c. Et quicquid, &c. Et maxime de advocacione prædicti ut de feodo & jure, &c.* Brown's Anal. 7.

(C) What may be pleaded after Defence made. [501]

1. **T**HE tenant after defence made may say *that the grand cape was not served, &c.* but not after any other plea pleaded. Thel. Dig. 202. Lib. 14. cap. 1. S. 1. cites Mich. 22 E. 3. 18.

2. After defence of damages done, and after hearing of the writ, the defendant may say, *that the plaintiff is a monk professed, and feme defendant may say, that she is covert of baron.* Thel. Dig. 203. Lib. 14. cap. 1. S. 2. cites Hill. 44 E. 3. 4. & 32 H. 6. 27.

3. In *quare impedit*, the defendant defended the tort, and force, and damages, and demanded oyer of the writ, and *pleaded that the plaintiff is a chanon professed*, judgment, if he shall be answered, and the plaintiff replied, *because he has made a full defence and has had oyer of the writ*, judgment, if he shall say *nonability to the person after*; for after such matter in action against a feme she shall not say that she is covert baron, which Caund. expressly denied, and said, that she shall have the plea. And per Cur. this plea is to the action, and also nonability of the person, therefore answer, by which he said, *that such a prior is patron of the vicarage of B. where the plaintiff is vicar, and have used time out of mind to present one of their chanons, and such chanon so presented vicar has been perpetual and not removeable, and have impleaded and been impleaded time out of mind.* Judgment, and the best opinion was, that he is not by this discharged of his profession but only of his obedience, and that in this case he is a person able to have all actions touching this vicaridge, but this *quare impedit* was used upon a grant made to the plaintiff of another advowson, therefore *quare* as here; for it was agreed, that he may be elected prior of the first house at an avoidance. And per Finch. if a man recovers the patronage, where he is vicar, against the prior, he shall return to his house, and shall be obedient again. Br. Nonabilitie, pl. cites 44 E. 3. 4.

4. It is said, that the defendant after defence made shall plead *misfeasmer.* Thel. Dig. 203. Lib. 14. cap. 1. S. 5. cites Trin. 2 H. 6. 13.

plead *misfeasmer*, or *that he is abiding at another vill, &c.* But in such case he ought to make special defence in such form, viz. you have here W. who is sued by name, &c. Per Cur. Thel. 203. lib. 14. cap. 1. S. 3. cites Mich. 19 H. 6. 1. 2.

After general defence made the defendant cannot

5. In *præcipe quod reddat*, the defendant made defence, and *demanded the view*, he shall not plead to the jurisdiction upon the view, but shall have it to the writ, if the land lies in Wales, but otherwise it seems of ancient demesne. Br. Defence, pl. 13. cites 7 H. 6. 36.

6. In *præmunire*, the tenant defendit vim & injuriam and demanded judgment, if the Court would take consueance, and alleged the matter to be in Chester, which is a county palatine. Br. Defence, pl. 14. cites 8 H. 6. 3.

7. *Superfedeas of privilege in Chancery* was allowed by award after defence made; for it seems that there is great difference between pleading to the jurisdiction and *superfedeas of privilege*. Br. Defence, pl. 17. cites 19 H. 6. 32. & 3 H. 6. 30.

[502] 8. After full defence made, the defendant cannot say, *that the*
The difference is, where the plea is in
disability of the person, as alien, enemy, outlawry, &c. it cannot be pleaded after full defence, because it is repugnant, for by the full defence the defendant has admitted the plaintiff able to recover damages, but other pleas in abatement may be pleaded after full defence; for a full defence never admits an ill writ. Per Powell J. Ld. Raym. Rep. 117. Mich. 8 W. 3. in case of Britton v. Gradon.

9. *Trespass of sheafs*, the other justified as parson and pleaded to the jurisdiction, and it appears by Littleton there, that if a man makes full defence, he cannot plead to the jurisdiction after. Br. Defence, pl. 20. cites 1 E. 4. 15.

S. P. said according-ly, 12 Mod. 235. Mich. 10 W. 3. in case of Clerk v. Butler; but curia advisare vult.

S. C. cited Heath's Max. 25. Brown's Anal. 7.

10. *Misnomer* shall be alleged before defence, and then shall make defence, and shall shew the certainty of the misnomer. Br. Defence, pl. 46.

S. P. but, whether one shall take his protestation before or after defence, dubitatur. — General defence is a conclusion to plead misnomer after licence to *imparle de persona & de villa*; for it is contrary to the name affirmed by the general defence and imparlance; and therefore he ought to say that *J. S. of S. who is impleaded by the name of J. S. of C. defendit injuriam, &c. & petit licentiam interrogandi usque GElub. Hillarii, &c.* and then it is well, quod Curia conceffit. Br. Defence, pl. 15. cites 19 H. 6. 1.

11. *Trespass, assault, battery*, the defendant venit & defendit vim & injuriam, quando, &c. and pleads outlawry in abatement after imparlance; the plaintiff demurs; and adjudged that the defendant answer over; because he cannot plead such a plea after a full defence, by which he has admitted the plaintiff able to recover damages. Ld. Raym. Rep. 117. Arg. cites Trin. 35 Car. 2. B. R. Rot. 1528. Gawen v. Surby.

12. In *trespass, assault and mayhem*, the defendant venit et defendit vim et injuriam quando, and pleaded another action depending for the same cause undetermined in abatement, and judgment, quod respondeat ulterius, for the same reason as before. Ld. Raym. Rep. 117. Arg. cites Trin. 4 W. and M. in C. B. Meacock v. Farmer.

13. After the defendant has made a full defence in *trespass* by adding the words *quando, &c.* to the words (venit & defendit vim & injuriam

& injuriam) he cannot plead in disability that the plaintiff is an alien born, &c. but he ought to omit the (*quando*) because by that word, the defendant hath admitted that the plaintiff hath capacity to sue. Carth. 230. Pasch. 4 W. and M. in B. R. Jentreer v. Jenkins.

14. *Assumpsit* was brought against R. G. Esq; the defendant venit & defendit vim & injuriam quando, &c. and pleads that he is a gentleman, absque hoc that he is an Esq; &c. upon demurrer it was argued for the plaintiff, that the defendant by saying vim & injuriam quando, &c. has made a full defence, and after that he cannot plead in abatement; but it was answered on the other side that it is good either way; for this is not a full defence, but the moiety of a defence; for that a full defence is when the defendant proceeds and says, & damna et quicquid quod ipse defendere debet, and cited Pasch. 3 and 4 W. and M. in B. R. Rot. 449. that the defendant after vim & injuriam quando pleaded that the defendant was an alien enemy, and the Court held that it was good the one way or the other. But per Powell J. *quando, &c. amounts to a full defence*, and damna & quicquid quod ipse defendere debet is never put in. No judgment was given as to this point, but all agreed, that the misnomer being pleaded in abatement by attorney is ill; and a respondeas ousted awarded. Ld. Raym. Rep. 117. Mich. 8 W. 3. Britton v. Gradon.

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15. Defendant came and defendit vim & injuriam quando, and then would plead *misnomer*; and said he could not plead that after pleading defendit vim & injuriam; for that he had admitted himself by that name. Curia advisare vult. 12 Mod. 235. Mich. 10 W. 3. Clerk v. Butler.

For more of Defence in General, see other proper Titles.

De Injuria sua propria.



(A) In what Cases it is a good Plea.

1. IN trespass the defendant justified for taking of the villein of his master, and the plaintiff said that de son tort, &c. pl. 35. cites 4 E. 3. 2.

2. In replevin of taking of cattle the defendant justified for execution of a recovery of 38s. in a court baron, the plaintiff said,

that de son tort demesne absque tali causa, and it was held that he shall not have such general averment *contrary to the special matter*, by which he said, that the cattle were not delivered in execution. Br. De son tort, &c. pl. 36. cites 38 E. 3. 3.

3. In trespass of taking a horse, the defendant justified, because T. held of him *by heriot service* to render his best beast tempore mortis, and the plaintiff as executor got the horse which was the best beast, and the defendant took it for heriot, and the defendant said, that de son tort demesne, Prist, &c. and the others e contra. Br. De son tort, &c. pl. 10. cites 38 E. 3. 7.

4. In trespass the defendant justified, because the plaintiff was in ward of the prince, by which he seized and granted to the defendant, whereupon he entered and occupied, &c. and the plaintiff said, that de son tort demesne without such cause, and no plea per Cur. but ought to answer to the several matter, by which issue was taken that he held in socage, and not in chivalry. Br. De son tort, &c. pl. 6. cites 44 E. 3. 18.

5. In replevin the defendant justified to make replevin by warrant of the sheriff, the plaintiff said, that de son tort demesne without such cause et non allocatur contra to this special matter by which he said, de son tort demesne absque hoc, that he had warrant from the sheriff at the time of the delivery. Br. De son tort, &c. pl. 28. cites 13 R. 2. and Fitzh. tit. Issue, 163.

6. In replevin the defendant made consuance as bailiff of R. B. and the plaintiff said, that de son tort demesne without such cause, and no plea but shall answer to the consuance. Br. De son tort, &c. pl. 27. cites 2 H. 5. 1. and Fitzh. tit. Issue, 132.

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Where the defendant justifies the taking of beasts by special matter, by agreement of the plaintiff himself. there de son tort demesne, &c. is a good plea; for the justification is only matter in fact. Br. De son tort, &c. pl. 25. cites 10 H. 6. 3. and Fitzh. Issue, 58.

In trespass, per Littleton, where the defendant justifies by all of the plaintiff, as by gift or licence, &c. there the plaintiff shall not say that de son tort demesne, absque tali causa, but shall answer to the matter, quod nota. Br. De son tort, &c. pl. 41. cites 9 E. 4. 41.

8. But where lease or licence is pleaded, the plaintiff shall not say de son tort demesne absque tali causa, but shall answer to the special matter. Br. Ibid. cites 10 H. 6. 9.

9. Nota where patentee of the King comes to justify the matter, de son tort demesne absque tali causa is no plea; for the justification

ation is by matter of record. Br. De son tort, &c. pl. 32. cites 33 H. 6. 29.

10. Trespafs of cutting trees the defendant pleaded gift of the plaintiff to which the plaintiff said, that de son tort demesne, contrary to 9 E. 4. Br. De son tort, &c. pl. 34.

11. Trespafs of assault and battery against three defendants, two of them pleaded that they were lessees of certain lands, and there were certain posts on the land, and the plaintiff would have taken them away, and they gently took them from him; and the third pleaded, that he found the plaintiff and the other contending about the posts, and he parted them by laying his hands molliter on the plaintiff, &c. *quæ est eadem*, &c. the plaintiff replied *de injuria sua propria absque tali causa*, &c. and it was found for the plaintiff; it was moved, that here was no issue, because the plaintiff ought to have made several replications, and *absque tali causa* can be no issue to all. But per Cur. though it is no good form of pleading, yet by reasonable construction these words (*absque tali causa*) being nomen æquivocum shall be referred to every cause; and so judgment for the plaintiff. Cro. E. 139. pl. 15, Trin. 3^d Eliz. B. R. English v. Pellitary.

L. 124. pl. 169. S. C. The Court held accordingly, that though the form of pleading is not good, yet, for the reason here given, the pleadings shall be maintained; but the Report says, that judgment was afterwards given against

the plaintiff, [which seems to be a mistake in the printing.]

12. De injuria supra propria is no plea, where the defendant justifies by claiming an interest in the freehold to himself; but where one claims not any interest, but justifies by command, or authority derived from another, it is otherwise. Cro. E. 539. pl. 2. Hill. 39 Eliz. B. R. Archbishop of Canterbury v. Kemp.

13. In replevin the defendant as bailiff to one Pyne, who was seised of the third part of the place, where, &c. justifies for damage feasant. The plaintiff says, that a stranger was seised of the other two parts, and by his licence he put in his cattle. The defendant says *de injuria sua propria absque tali causa*, &c. And the plaintiff demurs, and it was adjudged to be no plea; but he ought to answer to the special matter in the bar. Cro. E. 812. pl. 19. Hill. 43 Eliz. C. B. Whitnel v. Cook.

14. When the defendant in his own right, or as servant to another, claims any interest in the land, or common or rent out of it, or way or passage upon it, there *de injuria sua propria* generally is no plea. 8 Rep. 61. a. the second resolution. Mich. 6 Jac. Crograve's Case. [505]

15. But if the defendant justifies as servant, there *de injuria sua propria* in the said cases with a traverse of the commandment is good, where the commandment is material, and this will reconcile the books. For the general plea *de injuria sua propria*, &c. is properly when the defendant's plea consists merely upon matter of excuse, without any matter of interest whatsoever. And it is said, *de injuria sua propria*, because the injury properly in this sense is to the person or his reputation, as battery or imprisonment to the person, or scandal to his fame, there if the defendant excuses himself, as upon son assault demesne, or upon the levying hue and cry, there properly

perly de injuria sua propria generally is a good plea; for there the plea consists only of matter of excuse. Resolved. 8 Rep. 67. Mich. 6 Jac. in the second resolution in Crogate's Case.

16. *When by the plea of the defendant, any authority, or power, is mediately, or immediately, derived from the plaintiff, there though no interest be claimed, the plaintiff ought to answer thereto, and shall not reply generally de injuria sua propria. And the law is the same of an authority given by the law, as to see waste, &c.* Resolved. 8 Rep. 67. a. b. Mich. 6 Jac. Crogate's Case.

17. De injuria sua propria is a good replication to a justification by the common law, or by a general act of parliament. 2 Salk. 628. pl. 3. Mich. 13 W. 3. B. R. Chance v. Weedon.

12 Mod.
840. S. C.
by name
of Chancey
v. Wynu,
& al'. & S. P.

18. If one come into my house by my consent, and he will not go away when I would have him go, I may by authority in law turn him out; if he brings trespass for this, and I set out all the matter specially in my justification, de injuria sua propria generally will be a good plea. Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Case of Chancey v. Win & al'.

19. If in trespass against a constable he justifies, for that he was a constable, and the plaintiff was breaking the peace, for which he committed him; may not the plaintiff reply, de injuria sua propria absque tali causa? Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Case of Chancey v. Win & al'.

See a Letw.
1347. 1350.
Hill. 2 & 3
Jac. 2. Kil-
bourne v.
Vallence.
S. P.

20. Trespass for taking and impounding a gelding at Scarborough. Defendants plead, that the place where the gelding was taken is called *Weapness*, containing 1000 acres in Scarborough, of which the bailiff and burgeses of Scarborough were seised in fee, and the defendants as their servants, and by their command, took the cattle damage feasant. To which the plaintiff replies, de injuria sua propria generally. To which the defendants demur, and shew for cause, that the plaintiff did not traverse. And judgment was given for the defendants. First, because several things are put in issue, which is a reason in Crogate's Case. 8 Co. 67. 2. Secondly, because where interest is in land, or claimed out of land, the plaintiff cannot reply de injuria sua propria. Comyns Rep. 582, 583. pl. 254. Trin. 11 Geo. 2. Cockerel v. Armstrong & al'.

For more of De Injuria sua propria in general, see other proper Titles.

Demand.

(A) Sufficient. What is.

1. **I**N debt upon a *bill of 70l. to be paid upon demand*, it was insisted, that a demand was requisite, so that a demand in law by bringing the action will not serve the turn; but adjudged well enough; for it is a duty presently and so needs no demand. *Cro. E. 548. pl. 22. Hill. 39 Eliz. C. B. Capp v. Lancaster.* S. C. cited Cro. E. 721. in pl. 49. S. P. Per Cur. Cro. E. 74. pl. 31. Mich. 29 & 30 Eliz. B. R.

2. Where one is *indebted to me severally in several sums of* money to be paid upon request, or demand made, and I go and say to him *pay me what you owe me*, this is not a sufficient demand or request. *3 Le. 206. pl. 166. Pasch. 30 Eliz. B. R. said to have been adjudged.* Bringing an action is a sufficient demand. Cro. J. 248. pl. 8. Pasch. 8 Jac. B. R. Dockray v. Tanning.

3. If a *will appoints payment of money*, and mentions no place, there must be a request. *Brownl. 46. Mich. 14 Jac. Anon.*

4. Where a contract is made, and no time *expressed for the payment* of the money, if the party bring his action before he makes a request, he shall not *have damages*, but if he makes an actual request and the defendant does not pay the money there, he shall recover damages, besides the duty. *God. 362. pl. 454. Trin. 21 Jac. B. R. Gleede v. Wallis alias Harris.* But in debt or detinue where the very bringing the action is a request, if the defendant appears at the first summons, then he excuses himself, otherwise he shall be subject to damages, but the request needs not be so precisely alleged. God. 403. Pasch. 3 Car. B. R. by Jones J. in pl. 483.

5. A. in debt to B. in 12l. for goods, B. refused to trust him further, on which C. comes to B. and prays him to trust A. and if he would, he would pay him the old debt, and whatsoever A. should be in arrear more, if it did not exceed 100l. C. would pay. B. sold after to A. several goods amounting to 19l. and lent A. 3l. *One demand is sufficient for the three several sums.* *Hetl. 84. Pasch. 4 Car. C. B. Gammon v. Malbarn.*

6. If a man *promises to pay money at any time within a month upon request*, the creditor may request after the month, and the debtor shall have a month's time after the request to pay the money. *Freem. Rep. 346. pl. 429. Mich. 1673. B. R. Anon.*

7. Note, to pay 50l. to B. at any time during their joint lives, within

within three months after A. should demand the same, the demand ought to be personal. 2 Show. 235. pl. 232. Mich. 34 Car. 2. B. R. Duke of Norfolk v. Howard.

Shinn. 391.
pl. 27. S. C.
and judgment
accordingly,
the constant
practice being
an exposition
of these words.

* 8. Demand *ore tenus* in some cases is good, as in case of stock to be transferred, it is the usage amongst merchants to make all their demands *ore tenus* upon such bargains, as well as sometimes by writing at the East-India House, and not to seek after the person of the vendor, and judgment accordingly. Carth. 269. Pasch. 5 W. & M. in B. R. Hall v. Copper.

9. *Distress for rent* is a demand in itself. See Rent (I) pl. 2. and 9.

(B) Necessary, or not. In what Cases, and where.

1. **A** LEASE was made for years, rendering rent payable at a place off the land; and the Court was moved, whether a demand of the rent may not be made upon the land, but denied by the whole Court; for they said, that the demand must be made at the place of payment, although it be off the land. Brownl. 96. Trin. 5 Jac. Ventris v. Farmer.

2. An executor brings trover of goods taken from his testator by a trespassor. It was held the executor must first make a demand of the trespassor before he can bring this action. Clayt. 122. pl. 215. March 1647. before Germaine one of the Judges of B. R. Coldwell's Case.

3. In action of debt upon a bond with condition to pay 300l. to the plaintiff, and to add 3l. to every 100 if it were demanded; the defendant pleaded payment of the 300l. and that he added 3l. to every 100l. *secundum formam conditionis prædictæ*. The plaintiff traversed the addition of 3l. to every 100 *secundum formam conditionis prædictæ*; after verdict, it was moved in arrest of judgment, that the plaintiff ought to have alleged a demand; and for this cause, judgment was given against the plaintiff, for this being matter of substance, without which the plaintiff had no cause of action, was not helped by the issue nor verdict, notwithstanding the words *secundum formam conditionis*, which was pretended to imply a demand. Allen, 55, 56. Pasch. 24 Car. B. R. Hill. v. Armstrong.

4. A difference was taken by Serjeant Jones, between a limitation which depends on the doing of some collateral act, which is to be done but once, and the payment of a rent issuing out of the land, which hath successive acts; that in the last case there ought to be a demand, but not in the first. Freem. Rep. 24. Hill. 1671. pl. 32.

5. Debt upon a bill obligatory, *scilicet*, barratry of J. S. 10l. which I promise to pay upon demand; the plaintiff says, *quod licet sapius requisitus* he had not paid it, but does not lay any actual demand; and verdict being for the plaintiff, Baldwin moved in arrest of judgment, because no particular request in time and place is

is averred; and cited the Case of *Brown v. Dunnery*, Hob. 208. But per Curiam a request is not here necessary, it being for the payment of a debt, and between the parties; but if it had been upon a *penalty, or a promise by a stranger, or for some collateral matter*, there a request must be laid; but here appears that a debt was due, and it being for the payment of money by the debtor, although it be said upon demand, yet the bringing of the action is a sufficient demand. *Freem. Rep. 113. pl. 135. Trin. 1673. Ashenden v. Clapham.*

6. *A. was indebted to B. and A. dies, and after B. comes to C. and demands the money, and C. in consideration that B. would for- bear his debt, (or to sue) did promise to pay him.* Objection was [508] made that this being a collateral promise, and no debt due from the defendant, here ought to have been a request. But to that the Court answered, that a request was not necessary, the *promise being generally to pay, and not upon request.* *Freem. Rep. 439. pl. 595. Mich. 1676. Anon.*

7. *Debt for a rent reserved upon a lease for years, in which there was a proviso, that if the rent be behind, and unpaid by the space of a month next after any, or either of the days of payment, then the lease to be void.* The plea was, that the rent was behind a month after a day, on which it was reserved to be paid, and so the lease is void; to which plea the plaintiff demurred, because the defendant did *not say that the plaintiff demanded the rent*; for though the rent be due without the demand, yet the interest shall not be determined without it, which must be expressly laid in the pleading; and of that opinion was the Court, except Justice Atkyns who doubted. *2 Mod. 264. Trin. 29 Car. 2. C. B. Steward v. Allen.*

8. Ejectment at Chelmsford assizes, held by Ld. Ch. J. Pemberton, that if *legacies be given by will, and that in case of non-payment, the legatees may enter and enjoy the profits of such and such land till satisfied*, no demand is necessary; for it is no forfeiture, but an executory devise, although there be a place and time appointed for payment, &c. So was the case of *Tyrrel v. Glasfack* here. *2 Show. 185. pl. 190. Hill. 33 and 34 Car. 2. B. R. Peirson v. Sorrel.*

9. Where the condition of a *bond given by a member of a society is to pay such sums as shall be due*, an action may be brought for non-payment without any demand; for it is a sum in gross. *Ld. Raym. Rep. 596. Trin. 12 W. 3. Levins v. Randolph.*

(C) In Actions real. Of what Things. Pleadings.

1. **S**ELION shall not be demanded *by præcipe quod reddat per judicium*; because it does not contain certainty; for it may be an acre or half an acre. *Thel. Dig. 69. Lib. 8. cap. 17. §. 1. cites Tempore E. 1. Brief. 866. And says, that 9 E. 3. 479. it was said two selions do not contain but one acre of land.*

2. *Thel.*

S. P. Thel.
Dig. 66.
Lib. 8. cap.
4. S. 6. cites
Hill. 8 E. 3.
881. Per
Sharde.

2. Thel. Dig. 66. Lib. 8. cap. 4. S. 5. says, it seems by the opinion of Trin. 4 E. 2. Brief 793. that a man shall have *præcipe quod reddat de passagio ultra aquam, &c.* but not against him to whom the course of the water is, nor *assise de passagio*, cites 31 E. 3. Assise 440. but against other occupier or disturber; for the *quod permittat lies against the tenant, &c.*

3. *Præcipe quod reddat* does not lie of *estovers*, nor *dower*. Thel. Dig. 68. Lib. 8. cap. 6. S. 1. cites Mich. 2 E. 3. Dower 123. but says the contrary is said Mich. 7 E. 3. Assise 138. per Herle and Sharde. of *præcipe quod reddat*.

4. *Bovata terra*, which is an oxange, lies in demand. Thel. Dig. 69. Lib. 8. cap. 13. S. 1. And says, it was held Mich. 2 E. 3. 57. that meadow, pasture, and wood, may be appurtenant to an oxange of land, and comprised in the words, *cum pertinentiis*. And that it is said in Plowden, 168. That an oxange of land may contain in it land, meadow, pasture and wood, and other things. And yet it is adjudged Mich. 13 E. 3. Brief 241. That oxange of marsh does not lie in *præcipe*; and it was said, that *bovata* is always of things which fall in tillage. Thelol says, that an oxange of land in his country contains 10 acres of land.

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5. *Carucata terra* is another quantity of a thing which lies in demand. Thel. Dig. 69. Lib. 8. cap. 12. S. 1. cites Mich. 4 E. 3. 161. and 6 E. 3. 283. where it was held that a house, mill, and toft, may be comprised within a carve of land. And says, see 35 H. 6. 29. where Prisot said, that a carve of land is greater in one country than it is in another country. And so it is of an oxange; moor, wood, or meadow, may be within a carve of land, cites Tempore E. 1. Brief 811.

6. *Præcipe quod reddat* was maintained of three rood of land. Thel. Dig. 69. Lib. 8. cap. 16. S. 1. cites Mich. 6 E. 3. 291.

7. A man shall not have *præcipe quod reddat de fossato, sive stagno*. Thel. Dig. 66. Lib. 8. cap. 4. S. 6. cites Hill. 8 E. 3. 381.

8. A man shall not have *præcipe quod reddat of a pifchary*. Thel. Dig. 66. Lib. 8. cap. 4. S. 7. cites 8 E. 3. 381. But says, that such *præcipe* was brought in the time of E. 1. Brief, 861. where it was said, that *præcipe quod reddat lies de stagno*, and says, see *Assise of Pifchary*, 12 H. 3. Assise 427. And of *Common of Pifchary*, 34 Aff. 11. And that fine was levied of a pifchary. Hill. 1 E. 3. 4. And says, see Mich. 13 E. 3. Entry 57, where it was said, that where a man is to demand *pifchary from such a place to such a place* in a water, *he shall make his demand of the soil*. And says, see writ of aiel brought of a pifchary. Trin. 20 E. 3. Brief 683.

9. In *assise* plaint was made of a place containing 40 feet in length, and 10 feet in breadth. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites 12 Aff. 1. and 14 Aff. 13.

10. But in *more dancester*, si obiit seifitus de octo pedibus terre in longitudine, & sex in latitudine, was held good, without saying, a place containing so many, &c. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites 16 Aff. 2. Hill. 16 E. 3. 650.

11. But

11. But a man cannot demand *the moiety of such a piece of land, containing, &c.* but he shall do it well of a piece entire. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites Mich. 9 H. 4. 3.

12. *Formedon* was maintained of an office of the serjeanty in a church cathedral. Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Trin. 18 E. 3. 27.

13. Writ of entry *ad terminum qui præterit* was maintained *de una bedellaria*. Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Pasch. 19 E. 3. View 77.

14. *Præcipe quod reddat* was maintained *de una balliva*. Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Mich. 34 E. 3. Brief 855.

15. And so it was *de balliva custodiendi talem parcum*. Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Mich. 7 E. 3. 361. and Mich. 8 E. 3. 423. and says, see Pasch. 10 E. 3. 508.

16. In *assise* plaint was made of two furlongs of land. Thel. Dig. 69. Lib. 8. cap. 18. S. 1. cites 40 Ass. 38. And says, that Hill. 4 H. 6. 14. a *formedon* was brought of six furlongs.

17. It was granted, that a man shall have *præcipe quod reddat quandam portionem terræ, &c.* Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites Hill. 11 H. 4. 43. and that so agrees Mich. 5 H. 7. 9.

18. Where a *feoffment* is made of two rood of land, and afterwards a house is built thereupon, and parcel made meadow, parcel pasture, and parcel made wood, &c. the demand shall be by name of a house, land, meadow, pasture and wood, and not by roods. Thel. Dig. 69. Lib. 8. cap. 14. S. 1. cites Mich. 39 H. 6. 8. And says, see Foreprise of a rood 4 E. 3. 159. and 8 E. 3. 377. And it is said in Plowden, fol. 108. that a rood of land may contain in it the said things.

19. A man shall have *præcipe quod reddat de una acra terræ cum aqua cooperta*, or *de una acra terræ generally* at his election. Thel. Dig. 66. Lib. 8. cap. 4. S. 3. cites Mich. 12 H. 7. 4. Per Vavisor. [510]

20. Theloal says, he has not seen any *præcipe quod reddat de fodina*, nor *de minera*, but there is a form of writ of covenant in the Register, fol. 165. *De minera plumbi et cujuscunq; generalis metalli cum pertin' in, &c.* Thel. Dig. 68. Lib. 8. cap. 8. S. 1.

21. Thel. Dig. 69. Lib. 8. cap. 9. S. 1. says, that in Glanville, fol. it appears, that at the ancient law, a man should have *præcipe quod reddat de una terræ*, but Theloall makes a quære of what it contains, and says, see the Register, fol. 2. and Bracton, fol. 434.

(D) Count or Declaration. In what Order the several Things shall be Demanded.

1. **A**LWAYS the thing of greater dignity shall be put before the thing of less dignity, and the thing general, before the thing special, and the entire, before its parts. Thel. Dig. 70. Lib. 8. cap. 20. S. 1.

Pl. C. 169.
2. Hill. 3 P.
& M. Arg.
in Case of
Hill v.

2. And Grange.

S. P. and cites the Register of Writs, that every thing is so placed there, and says, that this dignity is taken from the necessity; for to have a messuage for a man to inhabit, and to defend his body against tempella and violence of the air, is more necessary than to have land to

2. And because land upon which a house is built, is of more dignity than land without an edifice, *house* shall be demanded before *land*; and of edifices, *a castle* shall be demanded before *a messuage*; because it is of a greater dignity, and a *place of force and defence against the enemy in time of war, and against the rebel in time of rebellion*, and in time of peace for coercion of great misdoers by imprisonment, and a magnificent habitation for the nobles, and so it shall be put in demand before a manor, notwithstanding that it may be parcel of a manor, as appears 1 E. 3. 4. and 7 H. 6. 39. And this order is to be observed, of things of greater dignity. See Plowden, 168, 169. Thel. Dig. 70. Lib. 8. cap. 20. S. 2.

3. And so it shall be of things general, as land is to meadow, pasture, wood, &c. and shall be put in plaint or demand before them; for meadow is a species of land upon which the hay grows, and is mowed, and pasture, wood, rushy ground and marsh, &c. are species or kinds of land. And so wood is a genus to land; where all manner of trees grow, and therefore shall be put in demand before alder beds, and willow beds, which are only species of wood. Thel. Dig. 70. Lib. 8. cap. 20. S. 3.

plough for bread, and to have land for bread is more necessary than to have for hay for cattle, and to have meadow for hay which will serve throughout the year, is more necessary than pasture; & sic de similibus, and so a messuage is more worthy than land.

4. So the entire thing shall be demanded before the moiety of other part or parts of the same entire, as appears in the Register, and in the Natura brevium. Thel. Dig. 70. Lib. 8. cap. 20. S. 4.

5. Yet, notwithstanding the said rules, a writ was adjudged good, by which land was put in demand before a mill. Thel. Dig. 70. Lib. 8. cap. 20. S. 5. cites Hill. 9 E. 3. 444.

6. There is a note in the Register, fol. 81. in replevin, that if live beasts, and dead chattles are to be replevied, the live thing shall be put in the writ before the dead thing, &c. Thel. Dig. 70. Lib. 8. cap. 20. S. 6.

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(E) Demand; In the Disjunctive.

1. **I**N assise the plaint was of a robe, price 10s. or 10s. for the robe, at the feast of Christmas, and held good. Thel. Dig. 74. Lib. 8. cap. 24. S. 1. cites 3 E. 3. It. North. Assise 175. And that so it is agreed. 11 Ass. 8. and 29 Ass. 7. Trin. 11 E. 3. Variance, 69.

2. And n annuity, notwithstanding that the specialty be of a robe, price 10s. or of 10s. yet the writ may be of a robe only. Thel. Dig. 74. Lib. 8. cap. 24. S. 2. cites Pasch. 11 E. 3. Annuity, 27.

3. And it was adjudged in such case, that the writ of annuity may be quod reddat unam robam, or 10s. &c. Thel. Dig. 74. Lib. 8. cap. 24. S. 3. cites Pasch. 5 E. 4. 6. And says, see Mich. 13 E. 4. 4. That a writ of debt was brought of 20l. &c. where the specialty was of 20l. of 20 packs of wool, and says, see the same case 9 E. 4. 29.

4. A

4. A writ of error was brought upon a judgment given in a writ of entry in the post, upon which a recovery was had in the common pleas; and the error assigned was, because the writ of entry was, *De uno annuali redditu sive pensione 4 marcarum exeunt de ecclesia sive rectoria*. It was resolved, that the writ was good, for there is not any uncertainty in it, for one of two things is not severally demanded, but one thing only, for the demand is of rent, or a pension of four marks, so as there is not but one four marks. And *reditus* & *pensio* are all one; and the words *exeunt de rectoria* prove it to be a rent, for if it should be an annuity, the rectory should not be changed, but the person of the parson, in respect of the rectory. 5 Rep. 40. a. 41. a. Pasch. 35 Eliz. B. R. in Dormer's Case.

(F) Of divers several Things, or of Things of different Natures, in one Plaint or Demand.

1. A MAN shall make his *plaint of office, and of corody* in an *assise*. Thel. Dig. 75, Lib. 8. cap. 26. S. 1. cites Mich. 18 E. 2. Assise 377.

2. So of a *carve of land, and of corody*. Thel. Dig. 75. Lib. 8. cap. 26. S. 1. cites 7 Ass. 18. 11 Ass. 13. 23. and 7 E. 3. Assise, 138. in which books it was said, that a man in the same plaint, may put *franktenement at the common law, and franktenement by statute*.

3. So of *two rent services, and rent service, and rent charge*. Thel. Dig. 75. Lib. 8. cap. 26. S. 1. cites 15 E. 3. Charge 9. And so agrees 15 Ass. 11. but says, see Mich. 17 E. 3. 52. 75. that it was doubted if a man should have a plea of two rents, and at last adjudged that the plaintiff should recover.

4. An *assise* was maintained of *four several rent charges*. Thel. Dig. 75. Lib. 8. cap. 26. S. 2. cites 22 Ass. 52. 66. And says, it seems by 5 E. 4. 80. that a man shall have *writ of entry of diverse rents*. And says, see 12 E. 3. Assise 112. that the plaint in assise was of 40s. rent, 52s. rent, 7 * darec' and the rent of a robe severally upon several titles, &c. and adjudged good.

5. A writ of *annuity* was maintained of *4l. annuity* where the deed was that *four marks were granted for one cause, and two marks for another cause*. Thel. Dig. 75. Lib. 8. cap. 26. S. 3. cites 29 E. 3. Grant 101.

* Quære the meaning of the word.

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(G) Pleadings.

1. A LEASE was made of a house except certain chambers, *rendering rent with clause of re-entry*. The lessor entred for default of payment and in an action brought by the lessee, the lessor justified for this cause, and averred, that he demanded the rent ad damnum prædictum [domum prædictam.] It was moved in

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in arrest of judgment, because he did *not shew in what part of the house he made his demand*; for perhaps it was demanded in the chambers excepted; sed non allocatur; for domus prædict' is intended to be domus præmiis' [prædimis'] 2 Roll. Rep. 42. Trin. 16 Jac. B. R. Dorrell v. Truffell.

For more of Demand in General, See Actions. Condition. Rent. Request, and other Proper Titles.

Demurrer.

(A) Demurrer. How.

1. **T**HE form of demurrer upon matter apparent in the writ, and in its return is first to demand oyer of the writ and of the return, and after to say that they are insufficient, &c. as appears in the assise of Wymbishe, &c. Plowden, fol. 73. Thel. Dig. 217. Lib. 15. cap. 9. S. 1.

2. And the ancient form of demurrer upon the count is to say, that *non debet eidem petenti ad hanc narrationem, & ad hoc breve respondere, &c.* Dicit enim quod, &c. And so shew the cause of the demurrer, &c. *Unde petit judicium, &c.* Thel. Dig. 217. Lib. 15. cap. 9. S. 2. cites Mich. 7 E. 3. 349.

3. There is another form, to say, *ex quo narratio prædict' ad breve præd' manutenendum non est sufficiens, in lege petit judicium de breve.* Thel. Dig. 217. Lib. 15. cap. 9. S. 3. cites Pasch. 11 H. 6. 36.

4. Demurrer is an allegation of the defendant, which, admitting the matters of fact, or some of them, alleged by the defendant to be true, shews that, as they are set forth by the complainant himself, they are insufficient for him to proceed upon, or to oblige the defendant to answer; and therefore demands the judgment of the [513] Court, whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof. P. R. C. 131.

(B) What may be done upon, or after Demurrer.

1. **T**HERE can be no striking out, amendment, or alteration after a demurrer. Per tot. Cur. 1 Bulst. 204. Pasch. 10 Jac. Anon.

2. A

2. A demurrer *cannot be waived* without the plaintiff's consent. Cro. C. 513. pl. 10. Mich. 14 Car. B. R. in case of Talory v. Jackson.

3. After a demurrer by the defendant, the Court ordered that the plaintiff *reply* to the answer *notwithstanding the demurrer*, and proceed to examination of witnesses, and hearing the cause, but no costs allowed. 3 Ch. R. 57, 58. Trin. 22 Car. 2. Gascoigne v. Stutt. Nelf. Chanc. Rep. 143. Gascoigne v. Stutt S. C. in totidem verbis.

4. When a defendant has demurred, he may sign another cause of demurrer *at the bar* paying costs, and if such demurrer is overruled, he ought to pay double costs; but when a defendant has pleaded, and there is no demurrer in Court, he can't demurr at the bar, though he would pay costs. Vern. R. 78. pl. 72. Mich. 1682. Durdant v. Redman. One may demur a new ore tenus at the bar, but then on its being allowed he cannot have

costs. 3 Wms's Rep. 371. Per Ld. Chancellor. Trin. 1735.—Ibid. The reporter adds a note, that what is said in Vern. 78. Durdant v. Redman, that costs ought to be paid for a new demurrer insisted on at the bar, ore tenus is not now the practice.

5. Where a demurrer to a bill of *review* is allowed, it may be *inrolled*, but if over ruled it can't be inrolled so as to prevent the demurrer being re-argued. 2 Vern. R. 120. pl. 119. Hill. 1690. Woots v. Tucker.

6. When a demurrer is joined, the Court ought first to determine the matter of law, whether *sufficiens* or *minus sufficiens* before they pronounce judgment, and the judgment must be entered with *et quia videtur Curize hic quod placitum prædict'*, &c. 1 Salk. 402. pl. 10. Mich. 1 Ann. B. R. in Case of Atwood v. Burr.

7. Defendant demurs to a bill, and the demurrer is *allowed*, Ld. Lechmere Chancellor of the Dutchy gave the plaintiff *leave to amend*, though defendant strenuously insisted on it to be irregular, because by allowing the demurrer the cause was out of court, though before arguing it he might have amended. 2 Williams's Rep. 300. Trin. 1725. In the Dutchy Chamber. Ld. Coningsby v. Sir Joseph Jekyl Master of the Rolls. Agreeable to what was said by the Master of the Rolls, it was said by Ld. Ch. Talbot, that after a demurrer to

the whole bill allowed the bill is regularly out of court, and no instance of leave to amend it. Ibid. in a note at the end, cites 9 December, 1736. ——— v. Baines.

8. A defendant *cannot demur and plead, or demur and answer to the same part of a bill*; for the plea, &c. over rules the demurrer. 3 Wms's Rep. 80. Mich. 1730. in Case of Jones v. Strafford.

(C) Set aside.

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1. **T**HE plaintiff exhibited his *bill to be relieved for a promise* supposed to be made by the Lady Lutterell *for a lease of certain lands and for stopping certain ways*; the defendant had a *commission to take her answer*, and demurred; for that the plaintiff may have his *remedy by law*, which cause seems insufficient, and not to be allowed of, and the rather for that the defendant having a commission to take answers in the country did demur, therefore

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a subpoena

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a subpoena is awarded against them to make a better answer. Cary's Rep. 75. cites 18 & 19 Eliz. *Stuckly v. Lady Lutterell & al'*.

2. The defendant puts in demurrer to the plaintiff's bill *without shewing any cause of this demurrer*. Therefore ordered a subpoena be awarded against him to make a better answer. Cary's Rep. 153. cites 21 Eliz. *Offely v. Morgan*.

3. Because the defendant did *not put in his demurrer, according to the rule of the court*, it was moved to have it entered, but denied. Toth. 140. cites 14 Car. *Osborne v. Paget*.

4. The defendant *pleaded that there was a former bill depending, and brought by the same plaintiff, for the same matter as in this bill. And demurred, for that there was no equity in the bill, and that the same being 200 sheets of paper, was stuffed with repetitions, tautologies, and impertinences*. It was insisted by the counsel for the plaintiff, that by reason of the demurrer, he could not procure a reference to the master, to examine whether there was a former suit depending or not. Thereupon the Court over-ruled the demurrer with costs, and referred it to the master to examine into the former and this bill, if he found it for the same matter, then to tax costs for the defendant. Fin. R. 179. Mich. 26 Car. 2. *Dumford v. Dumford*.

5. Demurrer though *not formally joined* may be sufficient to bring the matter before the Court. Per Cur. Resolved. 3 Lev. 222. Trin. 1 Jac. 2. C. B. in Case of the King v. Butler.

6. Defendants had leave to plead answer and demur, but not to demur alone. They demurred and answered only by denying combination, or some such trifling matter, no ways material. The Court discharged the demurrer as not complying with the order, it being in effect a demurrer only. 2 Wms's Rep. 286. Trin. 1725. *Stephenson v. Gardiner*.

(D) What is Good Cause of Demurrer.

1. THE defendant put in a demurrer to the plaintiff's bill, because the plaintiff was outlawed at the suit of strangers, yet ordered to answer. Toth. 137. cites Mich. 9 Jac. *Skies v. Rawson*.—Ibid. 139. cites 10 Jac. *Morris Owen*.

Ibid. 138.
cites 5 Car.
Brooks v.—

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2. Demurrer, because *excommunicated*, over-ruled about 4 Car. Toth. 137. 4 C. *Plumton v. Headlam*.

3. Scire facias upon a judgment against several *terretenants*, who came in and pleaded several pleas; the plaintiff replied and said, *quoad separalia placita*, &c. Upon demurrer the point was, whether the plaintiff should say, *quoad placita of the one, &c.*; and so to answer to each plea particularly; or if the words *separalia placita* ought to be referred to the several pleas, *reddendo singula singulis*; and the Court held, that the saying *separalia placita* is good, and shall be construed *reddendo singula singulis*. Sid. 39. pl. 2. Pasch. 13 Car. 2. B. R. *Curtis v. Bateman*.

4. It is allowed a good cause of demurrer in this court, that a bill

bill is brought for *part of a matter only*, which is proper for one latire account, because the plaintiff shall not *split causes* and make a multiplicity of suits. Vern. 29. pl. 24 Hill. 1681. in Case of Purefoy v. Purefoy.

5. *Demurrer to scandalous matter suggested in a bill*; per Sir J. Churchill, as amicus Curiz, the course of the Court in such a case is not to put to the defendant to answer the scandalous matter, but to strike out the word demurrer, and leave the plaintiff at liberty to prove it. Vern. R. 137. pl. 96. Mich. 1682. Page v. Neale.

6. A *plea amounting to the general issue* is not always good cause of demurrer, as if it confesseth and avoideth. In debt for rent a release is a good plea, yet it might be given in evidence upon the general issue, et sic de simil. Per Holt. Cumb. 332. Trin. 7 W. 3. Anon.

7. *Not concluding to the country upon issue compleatly joined* is good cause of special demurrer. Per Cur. 7 Mod. 105. Mich. 1 Anne B. R. Crogate v. Martin.

8. Where a bill was exhibited to have an *execution of an award*, which was performed by neither party; and the defendant demurred because there was no precedent that a court of equity had ever carried such awards into execution; and the demurrer was allowed. Abr. Equ. Cases 51. Mich. 1704. at the Rolls. Bishop v. Webster.

9. Where a *tort is laid to be done after the action* brought, the defendant may take advantage of it on a special demurrer, Gilb. Hist. of C. B. 106.

(E) To what. To Bills in General.

1. **A** DEMURRER to a second bill of revivor over-ruled. Toth. 138. cites Hill. 7 Car. St. John v. Lady Thornburgh.

2. An original bill was brought to explain a decree. The defendant demurred. The plaintiff insisted, that the demurrer confessed the matter of the bill, but the Court allowed the demurrer good. 2 Freem. Rep. 179. pl. 242. 15 Car. 2. in Canc. Read v. Hanby.

to alter or change the decree; and it was insisted for the defendant, that no original bill ought to explain a decree upon any matter precedent to the decree, and that it would be dangerous, for it would be introductive of a means to blemish and hinder the execution of decrees; and the demurrer was allowed.

3. Bill for performance of an agreement. Demurrer, because *^[516] there was but 20s. paid as earnest to bind the bargain, which is but an inconsiderable execution of the agreement, and it being not under hand * and seal, the Court allowed of the demurrer. Chan. Rep. 241. 15 Car. 2. Simmons v. Cornelius.

defendant in earnest for a bargain of hops, which was alleged not to be a sufficient consideration to ground a decree upon; the Court allowed the demurrer. Fis. Rep. 153. Trin. 28 Car. 2. Fox v. Frost.

4. The plaintiff having only the possibility of the remainder of a personal estate, which is void in law, exhibited a bill for security of such estate, which the defendant demurred to, and the demurrer allowed. Chan. Rep. 260. 17 Car. 2. & 18 Car. 2. Hart v. Hart.

5. A. and M. his wife (the plaintiff's father and mother) were seised in fee of lands in which P. had estate for life. In 1643. A. and M. covenanted to levy a fine to the use of themselves for life, remainder to the plaintiff in tail male, remainder over. A. survived and then (as the bill suggests) forged another deed declaring the uses of the fine to be to the father and mother, and to the survivor of them, and to his or her heirs, under which deed the defendant purchased the lands of the father who is since dead; and P. the tenant for life being still living, the plaintiff exhibited his bill, to perpetuate the testimony of his witnesses to prove the true, and to disprove the forged deed. The defendant demurred to the bill for that he was a real purchaser under the pretended deed, believing it was true and real deed; and therefore inasmuch as it was to draw under examination a matter of forgery against a dead person, who could not answer for himself, and to get aid to impeach a real purchaser, the defendant did insist upon it, that he ought not to answer, nor the plaintiff be permitted to proceed any farther. And upon debate, it appearing that the tenant for life was still living, so that the plaintiff could not try his title at law; and that this Court is obliged in justice to preserve a title at law, which by such impediment could not at present be tried, the demurrer was over-ruled. Nelf. Chan. Rep. 125, 126. Anno 20 Car. 2. Seabourn v. Chilston.

6. A bill for 20l. promised to the wife, if she would procure a release from her husband for purchase money, which was part paid and the rents secured, defendant demurred for that it was no consideration, because the defendant was released by law, by payment and security, and allowed. Per Ld. Keeper Bridgman, 3 Ch. R. 70. 24 July, 1671. Stuckly v. Cook.

3 Chan.
Rep. 26.
S. C.

7. The plaintiff brought a bill against the defendant, as executor of the obligor, to discover assets, and to compel the payment of the debt. The defendant demurred, for that the plaintiff had brought an action against him at law; to which the defendant had pleaded plene administravit. But the demurrer was over-ruled, and the defendant ordered to answer without payment of costs. Nelf. Chan. Rep. 127, 128. Anno 21 Car. 2. Pitt v. Scarlet.

8. Plaintiff having obtained a decree against the defendant for money out of assets in their hands, they being executors, and they having denied assets, plaintiff brought a bill to discover assets. Defendants demurred, for that it did not appear that the decree was signed and inrolled, or the defendant served with any decree under seal. Demurrer allowed and bill dismissed. Fin. R. 33. 34. Mich. 25 Car. 2. Braithwait v. Davis.

9. A bill was brought to bastardize the issue, and set aside and overthrow the marriage of his late father with the other defendant, his mother. The defendant demurred, for that the validity of the marriage and legitimacy of the defendant is properly triable at law, and

and that the defendant the mother is not bound to discover upon oath that she is guilty of such a crime, as will subject her to the penalty of the statutes, and laws of the realm, and that the bill was scandalous and impertinent. The demurrer was allowed, and the bill to be taken off the file and burnt. Fin. Rep. 72. 73. Hill. 25 Car. 2. Trevor v. Lesquire.*

10. *Joint executors, one died, the executor of the executor brought a bill for relief against an action of trover brought by the surviving executor for goods of the first testator; the surviving executor demurred, for that the personal estate belongs to him, as surviving executor, and he is the person that is in law accountable to the legatees for the same, and for that the plaintiffs bill contains no equity. The Court allowed the demurrer. Fin. R. 171. Mich. 26 Car. 2. Burgh v. Davis.*

11. *The plaintiff exhibited a bill to discover several matters, and to examine witnesses, in order to prove a codicil, which he pretended was made by the defendant's testator, whereby he devised to the plaintiff all the goods of him, the said testator, then in the possession of the plaintiff. But it appearing, that this matter was depending upon an appeal to the Arches, the defendants demurred; for that this is a mere testamentary cause, and properly within the consuance of the spiritual court, where the same is now litigated, and where the plaintiff has a proper remedy for the recovery and relief. The Court allowed the demurrer. Fin. Rep. 218. Trin. 27 Car. 2. Cawston v. Helwyes.*

12. *Bill to discover several fraudulent conveyances set up against a mortgage, one of the defendants demurred, for that the bill is for different matters, against different defendants and the plaintiff did not distinguish for what particular conveyances or incumbrances made by the several defendants he would have a discovery made; plaintiff's counsel argued, that the bill was for a discovery of incumbrances made by the other defendants, wherein this defendant was not concerned, and this appearing to the Court, the demurrer was over-ruled, and this defendant was ordered to answer, but not to any incumbrances made by the other defendants. Fin. R. 240. Mich. 27 Car. 2. Draper v. Jason, Pargitur & al'.*

13. *Bill against an executor to enjoin him to exhibit an inventory and to give security to account before he goes beyond sea. Demurrer, for that this bill is to make an injunction in the nature of the writ of ne exeat regnum, &c. The Court allowed the demurrer. Fin. R. 257. Trin. 28 Car. 2. Bridge v. Hindall.*

14. *Bill to be relieved concerning an agreement for tythes and verdicts for tythes, and to discover what the agreement was, and what due for 4 or 5 years last past, defendant demurs, for that plaintiff ought to have set forth the substance of the agreement, or what sum was [to be] paid in lieu of tythe, or what was actually paid, and for what tythes, all which was within plaintiff's own knowledge, and though bill does not charge that the witnesses to prove this pretended agreement were either dead, or beyond the seas, when plaintiff was sued at law and a verdict against him, so that he might have pleaded the composition at law, or given the same in evidence*

at the trial, the defendant need not set forth the quantities, qualities, and value of the respective tythes, due for four or five years past, the same *being properly in the cognizance of the plaintiff, who was owner and proprietor of the lands out of which they were to be paid.* Demurrer allowed. Fin. R. 389. Trin. 30 Car. 3. *Tregonnel v. Forbes.*

[518] 15. One thousand pounds was left by will to *purchase a dukedom* within a year for the head of a family, a bill was exhibited to have the money applied accordingly, but upon demurrer it was adjudged against the plaintiff, as well because it is illegal to acquire honour for money, as also, because the *bill was exhibited in time, so as to attach the money in equity within the year.* Vern. 5. pl. 3. Pasch. 1681. *Earl of Kingston v. Lady Pierpoint.*

16. In a bill by *obligee against the heir of the obligor* for payment of the debt out of assets alleged to be descended; if the bill does not *allege that the heir was bound by the bond,* defendant may demur. Per North K. Vern. R. 180. pl. 173. Trin. 1683. *Crofting v. Honor.*

17. The bill was, that the *plaintiff had obtained judgment against J. S. for 100l. and that the defendant upon pretence of a debt due to himself, and to prevent the plaintiff's having the benefit of his judgment had got goods of J. S. of great value into his hands, sufficient to satisfy his debt with a great overplus; and prayed an account and discovery of these goods.* The defendant demurred because the plaintiff had not alleged that he sued out execution, and had actually taken out a *fieri facias*; for until he had so done, the goods were not bound by the judgment nor the plaintiff intitled to a discovery or account thereof. The Court allowed the demurrer; the plaintiff ought actually to have sued out execution before he had brought his bill. Vern. 399. pl. 371. Pasch. 1686. *Angell v. Draper.*

18. Defendant demurred, because the bill was *against several defendants, for several distinct matters* but was over-ruled, because the plaintiff by his bill had charged the defendant with *combination* which defendant had not denied in his answer. Vern. R. 416, pl. 395. Mich. 1686. *Powell v. Ardern and Chevall.*

19. The bill was *to examine witnesses to preserve their testimony touching the title of certain lands in the bill mentioned.* The defendant demurred, because *there was no impediment that hindered the plaintiff from trying his right at law; and that he had not obtained any verdict in affirmation of his pretended title.* Demurrer allowed. Vern. 441. pl. 415. Hill. 1686. *Parry v. Rogers.*

20. Bill to *inforce the lord of a manor, to receive a petition in nature of a writ of false judgment to reverse a common recovery* demurred to, and allowed. 2 Chan. Rep. 387. 1 Jac. 2. *Alh v. Rogle and the Dean and Chapter of St. Paul's.*

20. If an *original bill* be brought for matters, part of which are in a former bill and decree, and part new or by way of *supplemental bill.* The Court will on a demurrer to so much as was continued in the former decree, send it to a master to see what was, and what was

Demurrer.

§18†

was not in the first bill, and allow the demurrer accordingly.
G. Equ. R. 184. Hill. 12 Geo. 1. in Canc.

(F) To Bills. Want of Parties.

1. **D**EMURRER for that an *infant sued not by his guardian*, and the father not being thought proper to be guardian, he being defendant, the eldest son clerk was appointed for that purpose. N. Ch. R. 45. 17 Car. 1. *Offley v. Jenny*.

8 Ch. R.
92. S. C.—
Nels. Chan.
Rep. 92.
S. C. &
S. P. ac-
cordingly.

2. A. made J. S. and J. N. executors durante minoritate of B. his son, and gave 100l. legacy to C. his other son. B. attained his full age and died. C. brought his bill for the 100l. against J. S. and *for an account of the surplus of A's estate*. J. S. demurred for that he and J. N. were made executors durante minoritate of B. who attained his full age, so that the *executorship being determined* some other executors or administrators ought to be called to answer, who might possibly make out some sufficient release or discharge. He demurred also as to the account of the surplus, because *there are others to whom defendants are liable to account, as well as to the plaintiff, and they not parties*. The demurrer was over-ruled as to the legacy, but allowed as to the demand of the account. Fin. Rep. 113. Hill. 25 Car. 2. *Atwood v. Hawkins*.

[519]

3. Bill to be relieved against an *award made by some members of the E. I. Company* touching the quantum of freight due from the company to the plaintiff. The arbitrators and some particular members being made defendants, they demurred to the whole bill, because the *plaintiff can have no decree against them, nor will their answers be evidence* against the company, and the plaintiff might examine them as witnesses. Demurrer allowed without putting them to answer as to matters of fraud and contrivance. 2 Vern. 380. pl. 347. Trin. 1700. *Dr. Steward v. E. I. Company*.

4. Demurrer to a bill for want of proper parties, was allowed as to part, and disallowed as to part. Fin. R. 113. Hill. 25 Car. 2. *Atwood and Davis v. Hawkins*.

(G) To Bills. Matter at Law, and want of Equity.

1. **S**UBPOENA in Chancery by W. against B. *to render certain goods and chattles to the value, &c. which T. B. forfeited to the King by reason that he was attainted of treason, and which came to the hands of the defendant, and which the King gave to the plaintiff by his letters patents, &c.* And the defendant demanded judgment of the subpoena, for the plaintiff may upon this matter have detinue at the common law, and then he shall not sue in equity by the subpoena; for subpoena does not lie but where he has

Demurrer.

no remedy at the common law, and then when the common law fails, he shall have subpoena in Chancery, and per Cur. the subpoena lies well, by which the defendant was commanded to make inventory of all the goods which he had of the said T. B. against the next day, or he should be committed to the Fleet. B. Conscience, pl. 6. cites 39 H. 6. 26.

2. A bill laying a promise to assure lands for 10s. in hand, and 2100l. at days, demurred and allowed, because it was but a preparation for action upon the case. Toth. 135. Trin. 38 Eliz. William v. Nevil.

3. A demurrer pleaded because remedy at law, over-ruled. Toth. 139. cites Pasch. 7 Car. Bland v. County of Cambridge.

Chan. Rep.
48 S. C.
The Court
on perusal
of precedents, conceived the matter of the bill to be of ill

4. A bill was brought after a verdict on an action sur case, suggesting matters in defendants cognizance, which the plaintiff could not prove at the trial. Defendant pleaded the verdict, and that the effect of the matter (which was a letter) was given in evidence on the trial, and demurred for want of equity, and plea and demurrer allowed. Chan. Cases, 65. Hill. 16 and 17 Car. 2. Sewell v. Freestone.

consequence, and allowed the demurrer to the bill.

[520] 5. Plaintiff in a bill of revivor, demurred to so much of the answer to it, as did set forth a pretended irregularity in the examination of the witnesses in the original cause, and also as to a variation of the evidences viva voce at the trial, and what had been deposed here. Demurrer allowed. N. Ch. R. 138. 22 Car. 2. Westhall v. Carter.

6. A bill was brought at the relation of several freemen of the Weavers' Company, against the defendants, wardens, &c. of the said company, setting forth their charters of incorporation and rules. But the defendants had been guilty of many breaches thereof, and had oppressed the freemen, &c. and mentioned some particularly, and for a discovery of the rest, and that they might be decreed for the future, to observe the charters, and to have an account of the revenue of the corporation, which the defendants had mispent, &c. was the end of the bill to which the defendants demurred, because as to part of the bill, it was to subject them to prosecutions at law, and to a quo warranto, and as to the other parts, the plaintiffs have remedy by mandamus, information, or otherwise, and not here, and of the same opinion was my Lord Keeper, who said, it would usurp too much on the King's Bench, and that he never heard of any precedent for such a case as this, and so allowed the demurrer. Abr. Equ. Cases, 131. Mich. 1705. Attorney General v. Reynolds & al'.

7. The plaintiff brought her bill to have an account of the real and personal estate of her late husband, and to have satisfaction thereout for defect of value of her jointure lands, which he covenanted to be, and to continue of such value. The defendants insisted, it was a matter properly triable at law, and she ought to be sent there to try it, for if she were damnified, this Court could not assess damages; but my Lord Chancellor said, the master might enquire

enquire into it well enough ; and therefore sent it to him to examine and report, and said, if he found there were any difficulties in it, he could send it to be tried afterwards. Abr. Equ. Cases, 131, 132. Mich. 1729. Hedges v. Everard.

(H) To Bills after Suits elsewhere.

1. **D**EMURRER, because the matter was *dismissed in the Court of Requests*, over-ruled. Toth. 136. cites 30 Eliz. Haddon v. Salter.

2. Demurrer, because the matter was *depending in the Exchequer* before the bill, over-ruled. Toth. 137. cites 35 Eliz. Biller v. Elliot.

3. A demurrer, because a *decree in the Exchequer*, over-ruled, and decreed here in presence of the Barons of the Exchequer. Toth. 140. cites Mich. 14 Car. Salter v. Bennet.

4. After an *examination and dismissal* of a cause, whether a will or no will in the Exchequer, without prejudice in law or equity, an original bill was brought in Chancery for relief as to the same matter, the Court ordered, that the plaintiff might examine any witnesses that were not examined in the Exchequer, and that as to the matters examined unto there, the plaintiff might examine the same witnesses de bene esse, and how far those de bene esse should be used, the Court would farther consider. Chan. Cases, 156. Hill. 21 & 22 Car. 2. Anon.

(I) To Bill. Length of Time.

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1. **A** BILL was brought to redeem an ancient mortgage, the *mortgages* demurred, in which case there was infancy and coverture for 60 years, the demurrer was saved to the hearing. 3 Chan. Rep. 55, 56. 22 Car. 2. Pratt v. Allen.

(K) To Bills. Where it is to subject to a Penalty, Forfeiture, &c.

1. **A**. *PURCHASED* the office of deputy of a bishop's register, for a term of years of the defendant, but was turned out before the years expired, and the defendant having got the deed in his own hands, refused to deliver it to the plaintiff. A. brought his bill for relief. Defendant demurred upon the 5 and 6 Ed. 6. against sale of offices of justice, or the deputation thereof; and averred, that the office of register concerned the administration of justice, and for that the plaintiff by his bill had confessed, that he had given money, or contracted for it contrary to the meaning of the statute; therefore he was disabled to execute

Demurrer.

secure the same, and the demurrer was held good. N. Ch. R. 27. 9 Car. 1. Lake v. Pridgeon.

2. A. presented a parson to a living, and took *a bond to resign on request* at any time within seven years; A's housekeeper being the parson's sister, *got away the bond*, and delivered it over to the parson. A. brought a bill to discover, and to be relieved; defendants demurred, and demurrer allowed. 2 Vern. R. 242. Mich. 1691, in the Case of Brainham v. Mannings, cited per Com'r. Hutchins, as Fortescue's Case.

3. Pickering seised of land, and Sir J. Werden of a *fee farm*, issuing out of it, *paid taxes only after the rate of 1s. and 3d. per pound*, and retained for the fee farm at the rate of 4s. at which the land-tax was, on which Sir J. Werden, owner of the fee farm rent, brought his *bill in the Exchequer*, and *prayed that Pickering should set forth the value of the land*, and what rent he received, and what he had paid for taxes, to which bill Pickering demurred, and the demurrer allowed, notwithstanding the CASE OF SHERINGTON was cited; the whole matter there appearing, and this being on a demurrer, which was made the difference. 12 Mod. 171. Hill. 9 W. 3. Pickering's Case.

(L) To Bills by Purchasers.

[522] 1. **B**ILLS to *discover a trust of a mortgage, and to redeem*, was brought by the heir; defendant demurs, for that it was to secure the payment of *money borrowed of them* by the ancestor, *without any trust*, and for that the defendants were *willing to reconvey*, free from incumbrances done by them, on payment of principal and interest, by which means the plaintiff may have the estate again, in as good condition as when it was made over to them by the ancestor, so that it was not material to the plaintiff, if there was any trust reposed in the defendants in the said mortgage or not; demurrer allowed with costs. Fin. R. 214. Trin. 27 Car. 2. Harvey v. Morris and Clayton.

(M) To Bills. For not setting forth any Title.

1. **D**EMURRER because *cestui que vie was not shown to be alive*, and over-ruled the demurrer not to be good. Toth. 136. cites 37 Eliz. Victor v. Read.

2. Plaintiffs claim a title under a fine and recovery on a deed to lead the uses. Defendant demurs, for that plaintiff made out no title, because such fine and recovery *was never levied or suffered*, or if they were, yet it is not alledged that the parties to the fine or deed of uses were then, or afterwards, *seised or possessed of the lands in the bill*, whereby to enable them to make such assurance as in the bill; so that the said bill is very *uncertain* and insufficient in those particulars thereof whereby any relief or discovery

is sought; demurrer allowed with costs, and plaintiff to amend his bill as he shall be advised. Fin. R. 268. Mich. 28 Car. 2. Lawrence and Hetley v. Doughty.

3. Bill by an *occupant* against defendant who had got the original lease and threatened to cancel it and take a new lease from the bishop. Defendant demurred for that the plaintiff did *not* *aver the life or lives* of any of the nominees in the lease *were then in being at the death of the lessee*, and that this court doth *not* countenance the title of an *occupant* against a *purchaser* for a valuable consideration. Demurrer allowed, but without costs, and dismissed the bill. Fin. R. 270. Mich. 28 Car. 2. Rosier v. Evans.

4. *Executor* brought a bill for recovery of some of *testator's assets*, but the bill did not *show that he had proved the will* in any court, whereupon the defendant demurred. And upon the Court's asking the register what the course of the Court was in this point, he said, that the plaintiff's bill ought to allege that he had duly proved the will; but though he did *not mention in what court* it would be well enough; whereupon Ld. C. Macclesfield allowed the demurrer. Wms's Rep. 753. Mich. 1721. Humphreys v. Ingledoff.

In a note added to this case, it is said that Ld. K. North, when he first came into Chancery, was of opinion, that a plaintiff admi-

nistrator ought to *show* by his bill, where he had taken out administration, to the intent the defendant might know in what court to look for it, which might be void, if taken out under a wrong jurisdiction; but that of late, the general allegation of having duly taken out administration, has been held good, especially where (as on demurrer) the cause is not then to be determined, but he must *show his letters of administration at the hearing*. And the note says, that this was so said, and determined by Ld. King, 13 Dec. 1732, in Case of Stone v. Baker.

5. A *sci. fa.* was brought by an *executor* to *revive a decree*. The testator died seised of bona notabilia in 2 dioceses within the province of Canterbury, and the executor proved the will only in the arch-deaconry of S. Ld. C. Macclesfield, upon this being pleaded, ordered, that the plaintiff should not proceed any further in his suit unless he *show the defendant a sufficient probate of the will*. Wms's Rep. 766. Mich. 1721. Comber's Case.

(N) To Bills of Revivor or Review.

[523]

1. A BILL of revivor was brought, which was to *revive* all former proceedings, and *particularly an order by consent*. The defendant demurred to the bill, for that it sought to *revive* that order, whereas *the feme, who was party to it, was executrix, and only during her widowhood* and her executorship *to consist on her marriage*, and she being *married since*, her executorship, and consequently *her consent, was determined*. And upon debate (which was the only work of the day) the demurrer was allowed. Chan. Cases, 77. Mich. 18 Car. 2. Hampden v. Brewer.

2. A demurrer was to a bill of review exhibited on *new matters* for that it ought not to be admitted where the matter was of the knowledge of defendant at the time of the answer and hearing, though

a Chan. Rep. 66. S. C. says, that prece-

dents being produced by the plaintiff, his lordship declared, that the same seemed of no weight to the plaintiff's purpose, and dismissed the bill of review.

3. Bill of *review* was brought, and *errors assigned in the decree*. Three errors were assigned; defendant pleads money still due to him, which plaintiff ought to have paid before he be admitted to a bill of review, and demurred as follows, viz. For that there doth not appear such error in the body of the decree, for which the same ought to be reviewed or altered, and that the supposed errors arise from matters of fact not therein mentioned. The Court over-ruled the demurrer as to the first error, but allowed the demurrer to the second and third errors. Fin. R. 36. Mich. 25 Car. 2. Tredcroft and Rigg v. White.

(O) To Answers and Replications.

a Freeman. Rep. 181. pl. 249. S. C. states it as a demurrer to an answer to a bill of review; and that the demurrer was, because it would tend

to perjury, and infiniteness, to examine things examined and decreed, and that the Court was of that opinion, but that as well the defendant's counsel as the Court said, that there could be no demurrer upon an answer in equity, but Serjeant Glyn for the plaintiff said, he had known it. The Court made an order that there should be no examination of that which had been examined before, and that was the rule.

1. DEMURRER to an answer to a bill of review, which tendeth to draw into examination de novo an agreement contained in the decree; though the Court thought it unreasonable, yet doubted what to do as to the demurrer; some at the bar said, that the Court should have been moved in this special case for an order to restrain an examination of matters formerly examined, and it was now ordered that no matter examined to before should be re-examined. The reporter says, he takes it that this was the rule that was given. Sed quære. Ch. Cases, 56. Trin. 16 Car. 2. Williams v. Owen and Arthur.

[524] 2. The plaintiff putting matter in the replication, which was not contained in the bill, and which matter the plaintiff knew of at the exhibiting the bill, the defendant pleaded and demurred to the replication, which this Court allowed of. Chan. Rep. 259. 17 Car. 2. Goodfellow v. Marshall.

3. A decree being made, and a bill brought to execute the decree, the defendant set forth a *parol agreement in bar*. The plaintiff demurs, and Ld. Chancellor allowed the demurrer, though the agreement was *subsequent to the decree*. The decree shall proceed, and if the defendant will have advantage of the agreement, let him bring an original bill; for if he have advantage by it in

in way of defence, one witness may serve his turn, but to an original bill here if he in his answer denies the agreement one witness will not convict him, so as by this way of answer the plaintiff should lose the benefit of his answer. 2 Ch. Cafes. 8 Mich. 31^a Car. 2. Walkin v. Walthall.

(P) To Subpœna, &c.

1. **T**HE demurrer was to a *subpœna in the nature of a scire facias*, and it was because he that brought the subpœna did not thereby alledge himself to be the heir or executor to him that had the decree; resolved, that there never was any demurrer of this nature before, and the subpœna was no record nor any where filed, and so not to be demurred to; but the cause was to be shewn upon the return of the writ on the order, and the order did mention him that brought the writ to be both heir and executor, so this demurrer was conceived very ridiculous and over-ruled. Ch. Cafes, 50. Pasch. 16 Car. 2. Wan v. Lake. 3 Chan. Rep. 15. Ward v. Lake, S. C. in totidem verbis. — a Freem. Rep. 180. pl. 246. S. C. accordingly. — Gilb. Equ. Rep. 234. S. C. cited by Ld. Ch. Baron Gilbert.

(Q) What shall be over-ruling a Man's own Demurrer.

1. **D**EFENDANTS having demurred, for that the plaintiff had *made no title* to himself in the bill (as in truth he had not.) Hutchins insisted that the defendant had *over-ruled his own demurrer by having answered over* to several parts of the bill. But the matter of fact being denied, and there being no books in court the matter was adjourned. Vern. R. 90. pl. 79. Mich. 1682. Savage v. Smallbrook.

2. Where a man demurs, for that the bill contains *several matters not relating one to the other*, and in *some whereof the defendant is not concerned*, if by answer the defendant doth more than barely deny combination and confederacy, he *over-rules* his demurrer. Per Jefferies C. Vern. Rep. 463. pl. 442. Trin. 1687. Hester v. Weston.

(R) At Law. In what Cafes; and how con- [525] sidered.

1. **I**NQUISITION found that J. S. held certain lands of the King, as of his honour of Gloucester which is not in capite, upon which process issued against W. S. who had intruded, &c. and to sue livery, and because this tenure is not in capite, and therefore livery is not due, the party demurred in law upon the record; for

for there is no cause of livery. *Br. Demurrer*, pl. 25. cites 32 H. 8.

2. And where a man declares upon a statute, and recites it otherwise than it is, or pleads a statute otherwise than it is, the other may demur upon it; for there is no such law, if it be misrecited. *Ibid.*

3. A demurrer is properly called a plea; for the placitum is nomen collectivum. See *Ld. Raym. Rep.* 22. and *Carth.* 334, 335. *Mich.* 6 W. and M. in B. R. in *Case of Wilson v. Law.*

4. Where a demurrer is proper, the other party is bound to joine; and though it be on a plea in abatement if the demurrer is proper and apposite the other must join. *Comb.* 306. *Mich.* 6 W. and M. in B. R. *Campbell v. St. John.*

The defend-
ent demur-
red in abate-
ment, and plaintiff joined in bar, and judgment final for the plaintiff; for the Court said, they knew not what a demurrer in abatement was, for if the cause be apparent to the Court, they would abate the writ, &c. themselves, or else it ought to be pleaded, and they said they would turn all such demurrers into bars, though *Eyre* quoted *Wimbish v. Willoughby*, in *Flowd.* for a precedent of a demurrer in abatement. 6 Mod. 193. *Trin.* 3 Ann. B. R. *Docmanne v. Davenant*,——— *Salk.* 220. *Docmanique v. Davenant*. S. C. held accordingly.

5. There can be no such thing as a demurrer in abatement. *Per Holt. Ch. J.* 6 Mod. 195. *Trin.* 3 Ann. B. R. *Anon.*

(S) Where it is a Confession of Matters of Fact.

1. **I**N *trespass* the defendant justified to retain goods in pledge for 10l. due by the plaintiff, and the plaintiff demurred generally; by this he confessed the debt, by the opinion there, therefore ought to have taken protestation of the debt, and then to have demurred upon the plea, &c. *Br. Demurrer*, pl. 24. cites 5 H. 7. 1.

A demurrer
admits no-
thing but
what is well
pleaded;
per Cur.

2. A demurrer is a confession of all matters in fact, but not of matters in law; for by it they are put in judgment of the Court. *Pl. C.* 85. a. *Hill.* 6 & 7 E. 6. by *Mountague Ch. J.* in *Case of Partridge v. Strange and Croker.*

Freem. Rep. 39 *Trin.* 1672. *C. B.* *King v. Rotham*.——— *Freem. Rep.* 199. pl. 202. *Trin.* 1675. *Skedwin v. Lampen*. S. P. per Cur.——— A demurrer confesses only matter of fact, and that only when it is well pleaded; but it never confesses matter in law; per *Holt Ch. J.* *Ld. Raym. Rep.* 18. *Trin.* 6 W. & M. in B. R. cites *S. C.* & 5 *Rep.* 96.

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If a thing
be sufficient-
ly alleged
it is con-
fessed by
the demur-
rer but not
otherwise; per *Anderfon Ch. J.* *Goldsb.* 52. pl. 1. *Trin.* 29 *Eliz.* in *Specot's Case.*

3. A demurrer in law, is never a confession of a thing against the record, but only of that which may stand with the record, for otherwise, * his confession would be vain and should not bind the Court; per Cur. *Cro. J.* 12. *Pasch.* 1 *Jac.* B. R. in case of *Arundel v. Arundel.*

4. As a demurrer at common law did confess all matters formally pleaded; so now by the statute a general demurrer does confess all matters pleaded though informally, according to the forms meant by the statute 27 *Eliz.* 5. For such forms are now not material, not being expressed in demurrer. *Hob.* 233. at the end of pl. 295. *Mich.* 12 *Jac.* in the *Case of Heard v. Batherville.*

5. A *general demurrer confesses not the matter*; as if in debt upon a bill, defendant pleads payment, and the plaintiff demurs, that demurrer does not confess the payment; per Warburton J. Arg. Hutt. 15 Trin. 13 Jac.

6. *If the count, plea, replication, &c.* upon which the demurrer was, is good; then all the matter which is contained in the count or plea is confessed, but if the count or plea be vitious, then it is otherwise. 2 Roll. R. 22. Pasch. 16 Jac. B. R. in case of Holford v. Plat, cited per Cur. as a difference taken 17 Aff. pl. 2. 31 H. 6. & 24 H. 6.

Mountague*
Ch. J. said,
that it was
lately so
agreed in
the Exche-
quer, in the
Case of the
Commen-

dams, and so adjudged, that where title for the King was contained in that plea, on which the plaintiff demurred that there this question was no question of the King's title, because the plea was not good.

7. On a *scire facias to repeal a patent to B. for a market to be held at C.* reciting that there was an ancient market long before kept at R. within half a mile of C. and that there was an *ad quod damnum* taken out before the new patent, and the inquest thereupon taken, found it not to be to the damage of any, and that it was executed by surprize and without notice; and that notwithstanding it was to the great damage of the former market, &c. to this *scire facias B. demurred.* But the Ld. Chancellor Finch (assisted by North Ch. J. of C. B. and Jones J.) gave judgment for repealing of the patent; for the return of the writ of *ad quod damnum*, was not conclusive, and here *by the demurrer it is confessed to be to the damage of the former market.* 2 Vent. 344. Hill. 31 & 32 Car. 2. in Canc. Sir Oliver Butler's Case.

8. *Indebitatus assumpsit* for a horse sold for 20l. The defendant pleaded *within age.* The plaintiff replied, *that he sold him his horse for his conveniency to carry him about his necessary affairs;* to which the defendant demurred. And the sole question was, whether an action would lie against an infant for money for a horse sold? It was urged on the defendants part, that an infant was chargeable only for necessaries, as meat, drink, clothes, lodging, and education, and cited 3 Cro. 175. 1 Cro. Ayliiff v. Archbold. Latch. 169. But the Court were of a contrary opinion, for the plaintiff having averred, that he sold him the horse to ride about upon his necessary occasions, and the defendant having *confessed* it by his demurrer, it must now be taken to be so; if the defendant had traversed, then the jury must have judged of it, whether it was necessary or convenient, or not, and so likewise of the price of the horse, whether it was excessive or no. Jud. pro quer. nls. Freem. Rep. 531. pl. 715. Mich. 1680. Barber v. Vincent.

9. An action on the *case brought* upon an inland bill of exchange, in which the plaintiff declared *upon a special custom in London*, for the bearer to bring the action, &c. and upon a demurrer to the declaration it was held, that the defendant having demurred, *without traversing the custom*, he had thereby confessed there was such a custom, though in truth there was not, and for that reason the plaintiff had judgment; for though the Court takes notice

1 Salk. 129.
pl. 2. S. C.
held accord-
ingly. —
Skin. 346.
S. C. held
according-
ly. —
Comb. 204.
S. C. but

S. P. does not appear. — 18 Mod. 36. S. C. adjudged accordingly.

notice of the law of merchants, * as part of the law of England, yet they cannot take notice of the customs of particular places; and this custom as set forth in the declaration, being sufficient to maintain the action, and the defendant confessing it by his demurrer, he has given judgment against himself. 3 Salk. 68, 69. pl. 5. Pasch. 5 W. 3. B. R. Hodges v. Steward.

8. If a thing be *laid by way of prescription*, which does not lie in prescription, and it be demurred unto, that does not confess it; for if this be a course of the court it is law, and if it be law we are to take notice of it. Per Holt Ch. J. Obiter. 12 Mod. 573. Mich. 13 W. 3.

9. Demurrer confesses nothing but *what is materially alleged*. Arg. and seems admitted. 12 Mod. 578. Mich. 13 W. 3.

10. A demurrer is admitting the matter of fact, since it *refers the law arising on the fact to the judgment of the Court*, and therefore the fact is taken to be true on such demurrer, or otherwise the Court has no foundation on which to make any judgment. Gilb. Hist. of C. B. 55.

(T) General Demurrer; what is aided by it. Duplicity.

S. P. For double plea is no cause for demurrer generally. Br. Double Plea, pl. 73. cites 37 H. 6. 6.

1. **H**E who demurs *for double plea* cannot demur by the common demurrer that the plea is insufficient, but ought *expressly to demur for the doubleness*; for a double plea may be found a sufficient plea, unless for the inconvenience, that the one may be found for him and the other against him; per Fortescue. Br. Demurrer, pl. 7. cites 37 H. 6. 6.

2. In case of a *general demurrer*, he shall have *benefit of every thing* mentioned in the record, or of every point given him by the law, but otherwise in a *special demurrer*. Per Montague Ch. J. Pl. C. 66. Mich. 4 E. 6. in Case of Dive v. Manningham.

3. Upon a general demurrer, he that demurs shall have advantage of a *double plea*. Palm. 232. cites it as resolved, 4 Eliz. Ayer v. Joyner.

Upon a general demurrer duplicity is not fatal.

4. If one demurs generally to a *double plea*, it is not good at this day; per Anderson Ch. J. Gouldsb. 52. in pl. 1. Trin. 29 Eliz.

Comyns's Rep. 115. Pasch. 18 W. 3. B. R. in Case of Lamplugh v. Shortridge.

5. At this day by the *statute of Eliz.* where there is a *plea without a colour*, a plea amounting to a *general issue*, or a *double plea*; the demurrer to such pleas ought to be *special*; so if there be only *want of form*, a *general demurrer is not sufficient*, as it was at the common law. The law rejects double pleas, and pleas amounting to the general issue; because they are superfluous, and incurber the roll. Lex rejicit superflua. Jenk. 133 pl. 72.

6. In *trespass*, &c. the defendant as to the force and arms, pleaded not guilty, without saying *et de hoc ponit se super patriam*, and

and pleaded over to the trespass; the plaintiff demurred to this plea, for that it was double, insufficient, and wanted form; per Cur. the want (et de hoc ponit se super patriam) is matter of form, and therefore the plaintiff shall not have advantage thereof upon this demurrer, without shewing it for cause, and for that reason judgment was given for the defendant. Sid. 216. pl. 20. Trin. 16 Car. 2. B. R. Thacker v. How.

7. In demurrer for duplicity, it is not sufficient to demur *quia duplex est or duplicem habet materiam*; but the party must shew *uberein*; for the statute, by requiring to shew cause, intended to oblige the party to lay his finger upon the very point; per Holt Ch. J. 1 Salk. 219. pl. 5. Pasch. 13 W. 3. B. R. Lamplugh v. Shortridge.

[528]
Comyns's
Rep. 115.
pl. 78. S. C.
held per
Cur. ac-
cordingly.

8. By the 4 & 5 Ann. 16. no advantage can be taken upon a general demurrer, of such faults in form as would be cured by verdict, but such defects in pleading are aided upon a general demurrer by that statute. 10 Mod. 251. 348. Trin. 13 Ann. and Hill. 3 Geo. 1. B. R. Cole v. Hawkins.

See tit.
Amend-
ment. and
Joinders (Q)

9. Debt was brought upon a judgment in C. B. and the declaration was *Essex scil.* though the judgment was at Westminster, and therefore the action ought to have been brought in Middlesex; the defendant demurred generally. It was urged, that this was aided by 4 & 5 Ann. cap. 16. that the laying the action in a wrong county goes only to the form and course of proceeding, and not to the right of action; that if a trial had been in this case by an Essex jury, it would have been good after a verdict; yet the statute 16 and 17 Car. 2. aids only such defects as do not hinder the Court from giving judgment according to the right of the action, sed non allocatur; for the 4 and 5 Ann. does not give any remedy upon demurrer, but in matters of the same nature with those which are there specified. Judgment for the defendant. But plaintiff was afterwards allowed to discontinue on payment of costs. Comyns's Rep. 305. Mich. 5 Geo. 1. C. B. Hedgethorn v. Thurlock.

(U) Peremptory. In what Cases.

1. **W**HEN the demandant or plaintiff demurs upon plea to the writ pleaded by the tenant or defendant, the judgment is not peremptory to the tenant, but a *respondens ouster*. Thel. Dig. 238. Lib. 16. cap. 11. S. 1. cites Mich. 31 E. 3. Brief 343. Notwithstanding that delay be given till another term, cites 34 H. 6. 9. Aff. 1. 6 E. 3. 241. 5 E. 3. 20. and 22 H. 6. 63.

2. Where the demurrer is upon the cause of removing the plea, the judgment is peremptory to the defendant. Thel. Dig. 239. Lib. 16. cap. 11. S. 9. cites Mich. 27 H. 6. 4.

3. In entry for disseisin demurrer upon plea to the writ, or to the action of the writ, is not peremptory. Br. Peremptory, pl. 68. cites 34 H. 6. 8.

4. *Contra* if issue be thereof joined and tried per pais, this is peremptory to the tenant, and only to the writ as to the demandant. *Ibid.*

[529] 5. Cui in vita of four acres of land in D. the tenant pleaded to the writ, that the demandant himself had recovered one acre parcel of the demand against the tenant, and entered upon plea pleaded in the assise to the writ, and the demandant pleaded an estoppel that the tenant shall not say, that P. in which the recovery by the assise was had, was a hamlet of D. upon which they demurred. Per Littleton, this is only a respondeas ouster. But Moyle said yes, [that it was more] for you were at issue in the cui in vita, and this plea was pleaded to the writ, viz. the recovery of the parcel by the assise in P. which is a hamlet of D. and upon the demurrer to say this you are estopped, and therefore the issue is waived, and so the demurrer is peremptory; for it is not like to a plea pleaded in abatement of the writ before issue joined and demurrer had upon it, which all the justices granted, quod nota, and so see that demurrer upon a dilatory plea after issue joined is peremptory; for it is pleaded to avoid the issue, and an issue tried is always peremptory. *Pr. Peremptory*, pl. 45. cites 2 E. 4. 10.

6. Demurrer upon plea to the writ pleaded after issue joined is peremptory to the tenant. *Thel. Dig.* 239. *Lib.* 16. cap. 11. *S.* 11. cites *Trin.* 2 E. 4. 11.

7. In appeal it was said, that if the defendant demurs upon a plea which is adjudged against him, he shall be hanged, quod fuit concessum; but this does not seem to be of pleas to the writ which are not in bar. *Br. Demurrer*, pl. 17. cites 14 E. 4. 7.

8. Issue being joined upon not guilty in battery, at the assises at Huntingdon, the defendant pleaded an accord without alleging satisfaction; to which the plaintiff demurred; and the plea being certified upon the back of the postea, the plaintiff gave the defendant a rule to join in demurrer; but the defendant refusing, the plaintiff entered judgment, and took the defendant in execution. The Court held that the defendant refusing to join in demurrer, the plaintiff might lawfully enter upon his judgment. *Freem. Rep.* 252, 253. pl. 267. *Pasch.* 1678. *Abbot v. Rugeley*.

(W). To the Writ or Declaration. Good.

1. **I**N debt the defendant pleaded acquittance, which had no print of any seal, nor it could not be perceived that ever there was a seal, by which the plaintiff said, that because no print appeared, no law shall put him to answer, and the defendant said, Sir, because you do not deny that it is your deed, judgment, &c. and so see *Special Demurrer*. *Br. Demurrer*, pl. 5. cites 14 H. 4. 30.

2. In disseisin, if the defendant pleads not his deed in debt upon an obligation, and demurs in law upon the declaration, the demurrer

murrer is void, and the plea shall be taken. per Prisot. Br. Demurrer, pl. 1. cites 33 H. 6. 10.

3. So in the writ of *disceit* the defendant said, that the summoners and veyers were other persons than those who appeared, and gave addition, and the plaintiff said, that those who appeared were the same persons who were returned upon the *præcipe quod reddat*, and to the plea pleaded by the manner, &c. and therefore per Prisot, the replication shall stand, and the demurrer is void; and they are at issue which shall proceed, viz. by examination of the justices of those who appeared; for where the sheriff has returned, that those are they, who were returned in the first action, the parties shall not have averment to the contrary. Ibid.

4. *Trespass of a horse, and bridle carried away*, by H. S. against B. who said, that he himself was thereof possessed as of his proper goods, till H. S. of B. took them and gave them to the plaintiff, and the defendant retook them at the time of the trespass. The plaintiff said, that this H. S. named in the bar, and H. S. now plaintiff, are one and the same person, and not divers, and to the plea pleaded by the manner, no law, &c. and so the parties demurred in law, and the opinion of all the justices was, that the plea was good, and well pleaded, by which the plaintiff had writ to inquire of the damages; for by the nient dedire of the defendant, it is confessed, [530] that the one and the other, are one and the same person; for if otherwise, then the defendant might have taken issue upon it, and by the nient dedire, the plea of the defendant is not good, but amounts to not guilty. Br. Demurrer, pl. 12. cites 13 E.

4. 7.

5. *Trespass by H. B. guardian of the chantery of B. and the chaplains thereof*, the defendant said, that one H. B. was seised in fee, and leased to the defendant for years, which yet continues, and gave colour to the plaintiff for the term of life of the lessor. And the plaintiff said, that the said H. B. and this H. B. guardian, &c. are one and the same person, and not divers, and that the said H. B. never had any thing in the said land, unless in right of the chantery aforesaid, and to the plea pleaded by the manner, and so demurred, &c. and so a good demurrer by the disclosing of the special matter, and otherwise not. Br. Demurrer, pl. 13. cites 21 E. 4. 76.

6. The defendant demurred specially, because he was translated to abbot of another house after the making of the obligation, and the goods did not come to the last house, and so demurred. Br. Demurrer, pl. 9. cites 3 H. 7. 11. Br. Barr, pl.
69. cites
S. C.

7. In a demurrer to a declaration, it is not enough to say, *quod caret formâ*, but the particular want of form must be shewn. 2 Ld. Raym. Rep. 802. Mich. 1 Ann. B. R. *Shortridge v. Lamplugh*.

8. A *scire facias* was brought in C. B. to which the defendant demurred as to a declaration. The plaintiff joined in demurrer, and insists that his writ is good, and judgment was given for the plaintiff. Error was brought in B. R. and there the judgment was affirmed. 2 Ld. Raym. Rep. 1504. Trin. 13 Geo. 1. and 1 Geo. 2. B. R. *Blake v. Dödemead*.

(X) To Pleas. Good.

1. **I**N nuisance against three, the one pleaded in bar, and another made default, and the third said, that the land extended into two other vills not named in the writ, judgment of the writ. The plaintiff said, that he, who pleaded to the writ, had nothing in the franktenement, and therefore to the plea pleaded by the manner, &c. For he who is not tenant to the franktenement shall not plead this to the writ. Br. Demurrer, pl. 21. cites 5 E. 3. 10.

2. In debt upon arrears of account, the defendant tendered his law, and prayed that the plaintiff be examined, and upon the examination, it was found that the matter lay in account, and upon this the defendant pleaded in bar, to which the plaintiff said, that inasmuch as the defendant prayed examination, which examination is found against him, therefore to the plea pleaded by the manner, &c. and so demurred; for to his pretence this is peremptory. Br. Demurrer, pl. 22. cites 10 H. 6. 21.

So if the one takes the entire tenancy, and pleads in bar, absque hoc, that the other any thing has, the demandant may say, that both are tenants as the writ supposes, and demur upon the voucher, and this is good issue; for the tenant tendered travers before.

3. In p. accipe quod reddat against two, if the one takes the entire tenancy and vouchers, &c. absque hoc that the other any thing has, the demandant may say, that both are tenants as the writ supposes, and demur upon the voucher, and this is good issue; for the tenant tendered travers before. Br. Issues joines, pl. 61. cites 9 E. 4. 36.

that both are tenants as the writ supposes, and demur upon the bar pleaded by the one alone, per Catelby and Littleton. Ibid.——Br. Demurrer, pl. 16. cites 5 C.

[531] 4. In formedon against baron and feme, the baron for his feme pleaded non tenure, and the baron took the entire tenancy and vouched. &c. Catelby said, the baron and feme the day of the writ purchased, were tenants of the franktenements in jure uxoris, &c. Et hoc, &c. and to the voucher demurred. Per Littleton, in assise against several, if the one takes the entire tenancy and pleads in bar, the plaintiff may say that he holds jointly with the other, and to the plea plead by the manner. Br. Demurrer, pl. 20. cites 9 E. 4. 36. and 22 H. 6. 44. accordingly.

5. In debt upon an obligation with diverse conditions, if the defendant says that it is inserted upon such condition, and shews one only, which he has performed, the plaintiff may say that it is inserted upon this condition and others, to which the defendant has not answered, and therefore to the plea pleaded by the manner, &c. and demurred; for otherwise he shall lose the advantage of those conditions. Br. Demurrer, pl. 18. cites 21 E. 4. 78.

6. Trespass of goods carried away in B. The defendant justified in S. in the same county, absque hoc that he is guilty in B. Vavisor said, S. is a hamlet of B. and to the plea pleaded by the manner, no law, &c. and well; for now he has justified, and also pleaded not guilty as appears by the replication, and therefore a good demurrer. Br. Demurrer, pl. 14. cites 22 E. 4. 50.

7. So in assise the defendant pleaded feoffment of J. N. and gave colour. The plaintiff said, that the said J. N. and the plaintiff are one and the same person and not divers, and to the plea pleaded by the manner no law shall put him to answer, &c. And a good demurrer, by which Buliard pleaded over another plea. And so the special demurrer by declaration of the special matter; and upon this concludes with demurrer. Br. Demurrer, pl. 14. cites 22 E. 4. 50.

8. In replevin the plaintiff declared in a place called S. in B. The defendant said, that his father was seised of 100 acres of land in B. called M. and died seised, and the land descended, &c. and avowed for damage feasant, absque hoc that he took them in the place called S. and demanded judgment of the writ and prayed return, and the plaintiff said, that the 100 acres are so well known by the name of S. as by the name of M. and that the place called S. and the 100 acres called M. are one and the same place, and not diverse, et hoc, &c. And to the plea pleaded by the manner, &c. No law shall put him to answer. Br. Demurrer, pl. 8. cites 1 H. 7. 11.

9. Replevin of taking in a place called B. in N. the defendant justified in a place called S. in N. aforesaid for damage feasant absque hoc that he is guilty in B. the plaintiff said, that the place is known by the one name and the other, and to the plea pleaded by the manner, &c. and demurred. Br. Demurrer, pl. 19. cites 1 H. 7. 21.

10. Replevin; upon demurrer the case was, that the plaintiff in bar to the avowry shews that the land was copyhold land grantable in possession or reversion for life, or in fee, and that the lord granted the reversion unto him after the death of W. who was tenant for life, and shews the death of W. whereby he entered. And it was hereupon demurred; because he did not shew the beginning of W's estate, nor by whom W. had the estate granted him. And it was held to be no cause of demurrer, because it is not the plaintiff's title, but matter of conveyance thereto; wherefore it was adjudged for the plaintiff. Cro. J. 52. pl. 24. Mich. 2 Jac. C. B. Lodge v. Frye.

11. Debt for rent. The defendant pleads nil debet and so issue joined, and at the day of nisi prius the defendant pleads quod p'is darrein continuance the plaintiff released to him and does not name any place where he released, so as no issue could be taken; and to this the plaintiff demurred. And it was adjudged a fault incurable. Freem. Rep. 112. pl. 132. Trin. 1673. Gardner v. Bloxam.

(Y) In what Cases a Demurrer makes a. [532]
Discontinuance.

1. **I**N trover for a box and 290 peciis argenti, the defendant Comb. 306.
demurred to the declaration, and the plaintiff demurred to S. C.
the defendants demurrer, and concluded & hoc paratus est verificare; Ld. Raym.
the S. C. and Rep. 20.

the Court held it a discontinuance.

the defendant maintained his demurrer, and put the matter upon the Court. The Court held that all is discontinued by the plaintiff's not joining in demurrer, but demurring upon the defendants demurrer; for there is no difference between pleading over when issue is offered, and not joining in demurrer but pleading over; both are alike and make a discontinuance. 1 Salk. 219. pl. 4. Trin. 6 W. and M. in B. R. Campbell v. St. John.

1 Salk. 599. pl. 5. 1788 v. Goodwin. S. C. the scire facias was against the principal defendant and was (in hac parte.) And per Holt Ch. J. on search of precedents, where it is against the defendant himself, it should be (in hac parte) but where against the bail, it should be (in ea parte) and this will reconcile the precedents.——12 Mod. 214. Luck v. Goodwin, S. C. is that in scire facias exception was taken, that whereas it was said, "Petit judicium pro missa & custodiis in hac parte," that it should have been "in ea parte. But "in hac parte," was held good.

2. In *scire facias* on a judgment against the defendant, he pleaded in abatement no specification. The plaintiff demurred in bar. *Respondens ouster* was awarded. Afterwards the defendant pleaded the same matter in bar. The plaintiff demurred; and Carthew took exception, that there was a discontinuance here; because upon the plea in abatement the plaintiff had concluded his demurrer as if it had been in bar. Sed non allocatur. For where the defendant pleads a good plea in abatement, and the plaintiff replies new matter, he ought to maintain his writ; but if the defendant pleads an ill plea, though the plaintiff replies and concludes in bar, it is not material. *Ld. Raym. Rep.* 393. Mich. 10 W. 3. Lug v. Godwin.

S. C. cited 1 *Ld. Raym.* Arg. 1021. and 1023. and admitted by Holt Ch. J.

* See tit. Continuance, &c.

[E. 4.] pl. 11. S. C.

3. A demurrer, as an issue, must comprise the whole matter in plea, and if any part be omitted, it is a discontinuance, because the whole matter is not brought before the Court. Arg. 2 *Ld. Raym. Rep.* 1021. Hill. 2 Ann. B. R. in case of Crofs v. Bilson, cites *Yelv.* 5. 6. [Trin. 44 Eliz. B. R.] * Johnson v. Turner.

If the demurrer was in abatement, then it was a discontinuance, and the plaintiff might take judgment; but nevertheless he was not bound to do it, and therefore had his election, and might join in demurrer, and the Court upon this joinder shall give him judgment in bar. For the Court is not hindered by the conclusion of the demurrer in abatement to give judgment, as of right they ought, upon the whole record. Per Cur. 1 Salk. 3. pl. 8. the second resolution, in the Case of Crofs v. Bilson.

4. A demurrer as in abatement to a replication to a plea in bar is not a discontinuance, though the plaintiff might have taken judgment by nihil dicit. 2 *Ld. Raym. Rep.* 1023. Hill. 2 Ann. B. R. Crofs v. Bilson.

5. In *trespass* the defendant demurred after issue joined upon de injuria sua propria absque tali causa, it is a discontinuance and ill. 2 *Ld. Raym. Rep.* 1482, 1483. Pasch. 13 Geo. 1. B. R. Affett v. Vincent.

(Z) To Pleas. Where a stay of Proceedings.

1. **I**N waft it was agreed, that where a man *joins issue for part, and demurs in law for part* he shall not have *venire facias* or writ to inquire of the waft, or writ to inquire of the damages till the demurrer be adjudged. Br. Demurrer, pl. 2. cites 48 E. 3. 15.

2. In *scire facias* per Huls and Tirwit, where a man *joins issue for part, and demurs for the rest*, the issue shall be tried before the demurrer adjudged. Br. Demurrer, pl. 3. cites 11 H. 4. 5.

3. Where they are at *issue for part, and at demurrer for the rest*, the issue should be tried first to enquire of the damages, so that judgment may be given after of all at one and the same time, per Thirn et non negatur. Br. Demurrer, pl. 4. cites 11 H. 4. 75.

4. In *trespass of beasts taken*, the defendant pleaded to parcel not guilty, and to the rest another plea, whereupon the plaintiff demurred and the first issue was found against him by *nisi prius*, and he prayed judgment upon it, and had it before the demurrer tried, and so see the issue tried before the demurrer, and judgment also before that the demurrer was discussed. Br. Demurrer, pl. 23. cites 32 H. 6. 5.

5. *Trespass* upon anno 5 R. 2. the defendant pleaded not guilty to part and so to issue, and pleaded another plea of the rest, whereupon the plaintiff demurred in law, and yet *venire facias* issued to try the issue. Br. Demurrer, pl. 10. cites 3 E. 4. 2.

(A. a) Demurrer to Part, and Plea to Part.

1. **I**F a man in action *demurs for part, and joins issue for the rest*, *venire facias*, or writ of inquiry of damages, or writ of waft, or the like shall not issue before the demurrer be tried, by reason of the damages. Br. Trials, pl. 129. cites 48 E. 3. 15.

2. In *scire facias*, if he *joins issue for part and demurs for part*, the issue shall be tried before that the demurrer shall be adjudged, per Huls and Tirwit. Br. Trials, pl. 24. cites 11 H. 4. 5.

(B. a) Judgment on Demurrer on Plea to the Writ, or on Plea in Maintenance of the Writ.

1. **T**HE judgment upon demurrer, if the action lies without shewing speciality or not, it is peremptory to the tenant. Thel. Dig. 238. Lib. 16. cap. 11. S. 4. cites Mich. 18 E. 3. 50. 56. and in diverse other books; but it is to the action.

2. Where the plaintiff shews matter in his replication varying from the matter comprised in his writ, and the defendant for this variance demands judgment of the writ and demurs thereupon,

the judgment against the defendant shall be peremptory, if the Court awards against * him. Thel. Dig. 239. Lib. 16. cap. 11. S. 5. cites Hill. 32 E. 3. Bar, 261.

3. In *assise of rent charge* in Warblington, the deed of the grant was to take apud Warblington, and by the clause of the distress liberty was given to distrain in other tenements also in another county, &c. for which judgment was demanded of the writ for the not naming of the other tenements, &c. upon which was a demurrer, and the judgment a respondeas, and not peremptory. Thel. Dig. 238. Lib. 16. cap. 11. S. 3. cites Trin. 41 E. 3. 15. Charge 6. 41 Aff. 3.

4. In *debt* the defendant shewed forth superseas of the Chancery, testifying that he was a menial servant of the Chancellor, &c. and demanded judgment if the Court, &c. and the plaintiff rendered to oyer, that he was not his servant, &c. which averment was refused by the defendant, by which he was awarded to answer. Thel. Dig. 239. Lib. 16. cap. 11. S. 14. cites 21 H. 6. 22. But says that this exception goes to the jurisdiction.

5. In *præcipe quod reddat of rent*, the tenant pleaded a *darrein seisin* in the demandant, to which the demandant said, that he was not seised, &c. And the tenant pleaded plea containing matter to estop the demandant to say, that he was not seised of the rent, upon which plea the demandant demurred in law, and adjudged against the tenant that he should answer over, for it was not peremptory. Thel. Dig. 239. Lib. 16. cap. 11. S. 16. cites Mich. 34 H. 6. 8.

6. The judgment upon demurrer upon plea to the jurisdiction of the Court is only a respondeas. Thel. Dig. 239. Lib. 16. cap. 11. S. 12. cites Mich. 35 H. 6. 4.

7. The demandant and the prayee to be received were at issue upon the counterplea of the receipt, and afterwards the prayee pleaded that the demandant had entered after the last continuance, &c. Upon which the demandant demurred, and it was adjudged that he recover seisin of the land. Thel. Dig. 239. Lib. 16. cap. 11. S. 10. cites Mich. 37 H. 6. 2.

8. It is held, that after demurrer in law, if the tenant makes default, petit cape shall be awarded. Thel. Dig. 239. Lib. 16. cap. 11. S. 13. cites Pasch. 8 E. 4. 4.

9. In an action of debt upon a bond in C. B. the plaintiff declares, *quod cum* the defendant at London, &c. *per quoddam suum obligatorium*, &c. omitting the word *scriptum*. The defendant prays oyer of the bond, and it is entered in *hæc verba*, and pleads in bar, that the plaintiff had not specified the bond according to the act of parliament, and the plaintiff demurred. It was moved that this was a good plea in bar, for it was a temporary bar. If this be no plea in bar, yet now by the demurrer the plaintiff has confessed, that he has not specified the bond, and therefore the Court cannot give judgment for him; for by the express words of the act of parliament the debt is not recoverable. Trevor Ch. J. As to the demurrer, though it does confess the matter of not specifying, yet that shall not hinder the plaintiff from having his judgment;

judgment; for want of a specification like all other matters, must be taken advantage of in a regular way and by proper pleading. 2 Ld. Raym. Rep. 1055, 1056. Mich. 3 Ann. B. R. Copley v. Delaunoy.

For more of Demurrer in General, see Amendment and Joinders, Pleadings, Plea and Demurrer, and other proper Titles.

(A) Deodand.

[535]

1. IF a man be driving a cart, and the cart falls and kills a man, the cart and horses are a deodand. Hale's Hist. Pl. C. 420. cites 8 E. 2. Corone, 388.

2. And so if a cart runs over a man and kills him, the cart and horses are forfeited. Ibid. cites 8 E. 2. Corone, 403. 3 E. 3. Corone, 326. 342.

3. So if the timber that hangs a bell falls and kills a man, the timber and bell are both forfeited. Hale's Hist. Pl. C. 420.

4. If a man be getting up a cart by a wheel to gather plumbs, and neither the cart nor horses moving, the man falls and dies, neither the cart nor horses are forfeited, but only the wheel. Hale's Hist. Pl. C. 422. cites 8 E. 2. Corone, 409. Hawk. Pl. of the Cr. 66. cap. 26. S. 6. says it is said that if a ship by

a fall from which a man is drowned in the fresh water, shall be forfeited; but not the merchandize therein because they no way contribute to his death; and by the same reason it is, that if a man getting up the shafts of a waggon falls to the ground and breaks his neck, the horses and waggon only are forfeited and not the loading; because it no way contributed to his death; for which cause, where a thing not in motion causes a man's death, that part only, which is the immediate cause, is forfeited. But if he had been killed by a bruise from one of the waggon wheels, being in motion, the loading also would be forfeited; because the weight thereof made the hurt the greater.—See pl. 17.

5. If a man falls from an hay-rick whereby he dies it is said (wom, not adjudged) that it shall be forfeited. Hale's Hist. Pl. C. 422. cites 3 E. 3. Coron. 348.

6. If a man be killed, the property of his goods are in his executors or administrators, and are not deodand, per Belk. Br. Property, pl. 42. cites 8 R. 2. and Fitch. Indictment, 27.

7. If a man kills another with any weapon, the weapon is forfeited as deodand, and yet no default in man, unless for not better keeping it from him. Br. Forfeiture de terre, pl. 112. cites Dect. & Saund. Lib. 2. cap. 51. fol. 157.

8. If any horse strikes a man, and afterwards I sell him, and after-

wards

wards the man dies, the horse shall be forfeited. Arg. Pl. C. 260. b. Mich. 4 & 5 Eliz. in Case of Hales v. Petit.

Cro. J. 483. 9. If a man riding in a river is drowned by the violence of the stream, or sudden flux of water, the horse shall be no deodand. pl. 18. Ld. Chandois's Case seems Per Montague and Houghton, J. 2 Roll. R. 23. Pasch. 16 Jac. to be S. C. B. R. The King v. the Lord Cavendish. & S. P. held

accordingly per tot. Cur.——For the water, and not the horse was the cause of his death. Per Cur. Poph. 136. Anon. (seems to be S. C.)

If the horse carry his rider further into the river than he wanted, so that by the depth or strength of the stream he is drowned, there the horse shall be a deodand. Per Houghton J. 2 Roll. Rep. 23.——But if the horse throw him, and the stream carried him to a mill, and the wheel of the mill killed him, the horse and the wheel are both forfeited. Cited per Pollexfen Ch. J. so have been so adjudged 1 Salk. 280.——But then this throwing must not be by the violence of the water. 1 Salk. 280. cites Cro. J. 483. Lord Chandois's Case.——Hawk. Pl. C. 66. cap. 26. S. 6. says, it seems clear, that when a man riding over a river, is drowned through the violence of the stream, the horse is not forfeited; because, not that, but the waters, caused his death.

† Hale's Hist. Pl. Cr. 450. S. P. cites 8 E. 2. Corone, 389.

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Sid. 204. 10. A man was hanged by a bell-rope in the church; the S. C. the question was, if the bell shall be forfeited? The Court divided the bell. Lev. 136. * Trin. 16 Car. 2. B. R. The King v. the being fixed; church-wardens of Axminster. but process

was stayed till the Court are further advised, and it was not moved again, and so those of Axminster enjoyed their bells.——Raym. 97. S. P. and seems to be S. C. adjournatur.——Per Holt. Ch. J. a bell cannot be a deodand. 6 Mod. 187. Trin. 3 Ann. B. R. Obiter.——Hawk. Pl. C. 66. cap. 26. S. 6. says, that it cannot according to the late resolution, unless it was severed before the accident happened.

11. A door or gate which *per vim venti, &c.* kills a man by being forced upon him, is not a deodand. Arg. quod fuit concessum per Cur. Sid. 207. Trin. 16 Car. 2. B. R. in Case of the King v. Croffe and Dabbyn, alias Axminster Parish's Case.

12. If a jack-weight falls and kills a man, nothing is forfeited but the weight, and not the jack which moves it, because part of the freehold. Arg. Sid. 207.

In a great vein of lead, 13. Part of a load of tynn with the earth killed a man, adjudged, that nothing should be forfeited but that part which fell part of the earth fell Arg. Sid. 207. cites 12 R. 2. Fitzh. Forfeiture, 20. upon a mine and killed him; only that parcel, and the whole, was forfeited for a deodand. Jenk. 64. pl. 21. cites S. C.

14. Sail of a windmill killed a man as it was turned with the wind. Arg. Sid. 207. cites it as held per Clench and Fenner, J. that the sail shall not be deodand, because it is parcel of the frank-tenement, and shall go to the heir and not to the executor. Clench said, that the linen might be forfeited, but Fenner denied it, because it participates of the nature of the sail itself.

15. In aqua dulci a ship may become a deodand, but in the sea, or in aqua salta, being an arm of the sea, no deodand of the ship or any part of it, though any body be drowned out of it, or otherwise come by their death in the ship, because on such waters, ships and other vessels are subject to such dangers upon the raging waves, in respect to wind and tempest; and this diversity all our ancient lawyers do agree in, and it does more especially appear in the Parliament

Pryn's
Abr. of
Cott. Re-
cords, 150.
§ 1. E.
Numb 73.
Same peti-
tion and
answer.

Parliament Rolls, where, upon a petition it was desired, * That if it should happen, that any man or boy should be drowned by a fall out of any ship, boat, or vessel, they should be no deodands; whereupon the King, by great advice of his Judges and Counsel learned in the laws, made answer, The ship, boat, or vessel, being upon the sea, should be adjudged no deodand, but being upon a fresh river, it should be a deodand, but the King will shew favour. There are abundance of other petitions, upon the like occasion, in parliament. 2 Molloy, 225. cap. 1. S. 13.

* Fryn's Abr. of Cott. Rec. 164. 1 R. 2. Numb. 106. the same petition and answer.—And ibid. 198. 4 R. 2. Numb. 38. the like petition and

answer.—Ibid. 337. 1 H. 6. Numb. 35. the like petition and answer.—Same points, 3 Inst. 58. and cites the same petitions in the Parliament Rolls.

Hawk. Pl. C. 66. cap. 26. §. 6. says it is agreed by all, that a ship in salt water, whether in the open sea, or within the body of a county, from which a man falls and is drowned, is not forfeited, because persons are continually exposed to so many perils, that the law imputes such misfortunes happening there, rather to them, than to the ship.

16. A ship lying at Redriff, in the county of Kent, near the shore, to be careened and made clean, it happened that one of the shipwrights being at work under her at low water, the vessel (then leaning aside) fortun'd to turn over the contrary side, by means of which, the shipwright was killed; upon a trial at bar, where the question was, Whether *this deodand did belong to the Earl of Salisbury, who was lord of the manor lying contiguous to the place where the man was slain, or to the almoner, as a matter not granted out of the crown?* In that case it was resolved, that the ship was a deodand, and the jury thereupon found a verdict for Lord Salisbury, that the same did belong to his manor. 2 Molloy, 225. cap. 1. S. 13.

17. A cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon was driven upon a high bank, and overturned, and threw the person that was in the cart just before the wheels of the waggon, and the waggon run over the man and killed him. In the home circuit this was referred to Pollexfen Ch. J. and Gregory, and they gave their opinions, that the cart, waggon, and all the horses are deodands, because they all moved ad mortem. 1 Salk. 220. pl. 1. Case of the Lord of the Manor of Hampstead.

[537] Hawk. Pl. C. 66. 67. cap. 26. §. 6. says It is a general rule, that wherever the thing, which is the occasion of

a man's death, is in motion at the time, not only that part thereof which immediately wounds him, but all things, which move together with it, and help to make the wound more dangerous, are forfeited also; for the rule is, that *omnia quaeque movent ad mortem sunt deodanda*.

18. It is said in the books, that if a tree fall on the branch of another tree, and both fall to the ground, and the branch kills a man, the tree and the branch are both forfeited. 1 Salk. 220. in Case of the Lord of the Manor of Hampstead.

Hale's Hist. Pl. C. 420. S. P. circa 8 E. 2. Corone, 398.

19. Inquisition before the coroner super visum corporis found, that the wheel of a forge moved to the death of the deceased. And now it was moved to stay process for seizing it as a deodand, because parcel of a freehold, as the wheels of a mill or mill-stone, which were agreed to be freehold, and ideo not capable of being a deodand. And per Holt Ch. J. A mill is a known thing in law,

Hawk. Pl. C. 66 cap. 26. §. 5. says, that by the opinion of our ancient authors, things fixed

to the freehold, as a wheel of a mill, a bell hanging in a steeple, &c. might be deodands, but

by the latter resolutions they cannot, unless they were severed before the accident happened.

law, and so are the parts thereof; and therefore if the owner of a mill takes out one of the mill-stones to pick or gravel it, and devotes the mill, while the stone is severed from it, yet it shall pass as part of the mill; and a bell cannot be a deodand. Et per omnes; let process upon the inquisition stay. 6 Mod. 187. Trin. 3 Annæ, B. R. The Queen v. Wheeler.

20. If the party wounded *dies not* of this wound *within a year and a day after* he received it, there shall be nothing forfeited, for the law does not look on such a wound as the cause of a man's death, after which he lives so long; but if the party dies *within* that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation, or other act whatsoever, in the mean time. Hawk. Pl. C. 67. S. 7.

But where the officer seized it before the inquisition, and the inquisition is 11 months

after found the same, such after-finding was a good justification in trespass against the officer; because of the relation to the death. Kclw. 68. b. Mich. 21 H. 7. B. R.

21. Nothing can be forfeited as a deodand, nor seized as such, till found by the coroner's inquest to have caused the death of a man; but after such inquisition the sheriff is answerable for the value of it, and may levy the same on the town where it fell, and therefore the inquest ought to find the value of it. Hawk. P. C. 67. cap. 26. S. 8.

For more of Deodand in general, see other Proper Titles.

(A) Departure in Pleading: What is.

S. P. per Hide J. Sid. 10. in pl. 5. Mich. 22. Car. 1. C. B. As if in an assise the tenant

1. **A** DEPARTURE in pleading is said to be when the second plea contains matter not pursuant to his former, and which fortifies not the same, and thereupon it is called a *decessus*, because he departs from his former plea; and therefore whenever the rejoinder (taking one example for all) contains matter subsequent to the matter of the bar, and not fortifying the same, this is regularly

1. A departure, because it leaves the former and goes to another matter. Co. Litt. 304. a. and gives a colour, the demandant intitles himself by a feoffment from the tenant himself; the plaintiff cannot say, that that feoffment was upon condition, and to shew the condition broken, for that should be a clear departure from his bar, because it contains matter subsequent. Co. Litt. 304. a.

But in an assise, if the tenant pleads in bar that one J. S. was seized and infeoffed him, &c. and the plaintiff shewed that he himself was seized in fee, until by J. S. disseised, who infeoffed the tenant, and be re-entered, the defendant may plead a release of the plaintiff to J. S. for this does fortify the bar. Co. Litt. 304. a.

2. In mortdancester the tenant pleaded fine and nonclaim in the demandant, and he said that he was within age at the time, &c. and the tenant pleaded another fine and nonclaim when the demandant was of full age, and was not received to it, the reason seems to be inasmuch as it is a departure. Br. Departure de son ple, pl. 17. cites 2 Ass. 6.

3. Trespass of battery anno 17 E. 3. the defendant pleaded release anno 16, and to any trespass after not guilty, and the plaintiff said, that it was made by duress and this is a non-maintenance of his day, and therefore is a departure from his day, per opinionem, by which he maintained his first day. Br. Departure de son ple, pl. 28. cites 22 Ass. 86.

86. seems to be S. C. with this.

4. Trespass by J. citizen of N. against the bailiffs of S. because King H. 3. granted to those of M. that they should be quit of toll throughout all England, and the plaintiff came to S. and bought a ton of wine, and the defendant distrained him for 20s. The defendant pleaded that King John had custom in S. scil. of every ton of wine sold 8d. which he granted to those of S. by patent, rendering 200l. and the plaintiff bought the wine, and he levied of him 8d. which is custom and not toll, and also King John granted that this grant should not be defeated by any charter of later date, and the plaintiff replied, that composition was made after upon suit in B. R. between those of M. and those of S. scil. Southampton, where it was agreed that those of M. should go quit against those of S. and those of S. quit against them, and shewed thereof exemplification confirmed by this King and demanded judgment, and it was held there no departure where he claims to be discharged of toll, and the other justifies by charter, and the plaintiff replies by composition; Brooke says, quod miror! It seems to be ill pleading; for it seems that where the defendant justifies for custom and not for toll, the plaintiff ought to have maintained his writ. Br. Departure de son ple, pl. 8. cites 39 E. 3. 13.

5. Writ of scire facias upon a fine, the tenant said, that those, who were parties to the fine, had nothing at the time, &c. but one was seized, que estate he has, and the plaintiff replied, that J. N. had nothing at the time of the fine, and per Cur. he shall maintain the fine that the parties were seized, the reason seems to be inasmuch as otherwise it shall be a departure. Br. Departure de son ple, pl. 3. cites 40 E. 3. 3.

6. In scire facias upon a fine the tenant said, that those who were

pleads a descent from his father.

Br. Replication, pl. 52. cites S. C. — Litt. Rep. 170. Arg. Ass. [but no year] pl.

Br. Departure de son ple, pl. 29. cites S. C.

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were parties to the fine had nothing at the time, &c. but one J. que estate he has, and demanded judgment si actio, and the plaintiff said, that J. had nothing at the time, &c. and this is no replication; for he ought to maintain the fine that the parties were seised, &c. for otherwise it is a departure. Br. Replication, pl. 9. cites 40 E. 3. 30.

7. *Rescous of distress taken in a house and two tofts held of him.* Belk. said, he took them in one acre of land, which is hors de son fee, absque hoc that he took them in the house and tofts. There the plaintiff ought to maintain the place in the count, for other matter will be a departure. Br. Departure de son ple, pl. 32. cites 30 E. 3. 32.

8. *Replevin of taking the fourth day of May, the defendant avowed in the same place another day for damage feasant in his several,* the plaintiff said that it was his common, &c. and by this it shall be intended that it was taken the day that the defendant has avowed which is a departure from his count, by which the plaintiff maintained his count; but it seems that in this case the defendant ought to have traversed the day in the count. Br. Departure de son ple, pl. 31. cites 43 E. 3. 11.

9. *In avowry in D. if the plaintiff pleads hors de son fee and the defendant says that he took them in E. this is a departure.* Br. Departure de son ple, pl. 26. cites 8 H. 4. 16.

10. *In assise against baron and feme, the baron upon adjournment made default, and the feme was received and pleaded fine levied to W. P. and J. D. and to the heirs of W. que estate R. T. had and the land descended from R. T. to the tenant, and gave colour. The plaintiff said, that J. D. was thereof seised in fee and infeofed him and he was seised and disseised, &c. absque hoc that R. T. had the estate of the said W. P. and J. D. And the tenant said, that this J. D. is the same J. D. named in the fine, who had only for term of life by the fine, judgment if he shall be received against the fine, to say that he had fee, et non allocatur; because the plaintiff had made title and traversed the que estate, therefore the defendant cannot make departure, or do any thing but maintain the issue which he tendered and which the other has traversed. For where the party pleads a plea and traverses the other, it is no matter, if the matter of the plea be true or not; for he cannot say any thing but maintain the traverse.* Br. Departure de son ple, pl. 4. cites 11 H. 4. 81.

11. *In assise the tenant pleaded release of the plaintiff, bearing date at E. the plaintiff said, that he at the time, &c. was imprisoned at D. to which the defendant said, that after the imprisonment the plaintiff delivered to him the release at L. at large, and because he had departed from the place where the deed bore date, therefore the assise was awarded.* Br. Departure de son ple, pl. 13. cites 1 H. 6. 3.

12. *A man delivered an acquittance the 8th day of March, and the other made obligation bearing date the 1st day of March, and delivered it the 9th day of May, and he brought debt upon the obligation, and the other pleaded acquittance. The plaintiff replied, that*

that after the acquittance scil. the 9th day, &c. the obligation was *case where a man shall take advantage of primo delib- berat' he ought to* *primo fibi deliberat'*, this is a departure, for he ought to count that the defendant per scriptum suum, &c. dated the first day of May, et primo ei deliberat' the 9th day of May concessit se teneri, &c. Br. Departure de son ple, pl. 14. cites 7 H. 6. 4.

show it at first. Br. Departure de son ple, pl. 20. cites 5 H. 7. 27.

13. *Trespass of grass spoiled*, the defendant said *W. was seised in fee, and gave to J. N. in tail, who had issue D. and died, and after D. died, and the defendant entered as daughter and heir of D. and gave colour by D. the plaintiff said, that J. was seised in fee and infeoffed the plaintiff by whom he entered and was seised till the trespass, and the plaintiff said, that J. was seised and died seised, and D. entered and died, and after the defendant as heir of D. entered and died, and after the defendant as heir of D. entered and was seised till by the plaintiff ousted upon whom he entered. And by the best opinion, this rejoinder is a departure; for by the bar the gift in tail is their title, and by the rejoinder the dying seised is their title.* Br. Departure de son ple, pl. 5. cites 21 H. 6. 32.

14. *Trespass of a close broken and grass cut*, the defendant pleaded his franktenement, the plaintiff pleaded that to this he shall not be received; for his father whose heir, &c. infeoffed him with warranty by the deed, judgment if against the deed of his ancestor, which comprehends warranty, he shall be received. And the defendant said, that *R. was seised in fee, and infeoffed his father and him, and to the heirs of the son, and the father infeoffed the plaintiff, by which the defendant entered into the one moiety by alienation to his disinherittance, and took the other moiety by pro- testation.* Newton said, this is a departure; for by the bar that it is his franktenement he intitles himself to the whole, and by the rejoinder he intitles himself only to the moiety, therefore a departure, by which the defendant rejoined for the whole scil. the one moiety for the alienation, as above, and the other for the disseisin to him, &c. Br. Departure de son, &c. pl. 6. cites 22 H. 6. 50.

15. *Debt upon an obligation of 20l. to pay annually the farm of B. at the feast of Easter and St. Michael*, the plaintiff alledged arrears at Easter, and the defendant alledged tender to the plaintiff at Easter and refused by the plaintiff, to which the plaintiff said that he was arrear at Mich. This is a departure, and by this they repleaded after verdict, quod nota. Br. Departure de son ple, pl. 27. cites 22 H. 6. 57.

16. *In quare impedit the plaintiff counted of an advowson in gross and that he presented, and after the church voided and he pre- sented, and the defendant disturbed him, and the bishop, one of the defendants, pleaded, that he claimed nothing but admission, insti- tution and induction as ordinary, and demanded judgment if without special disturbance, &c.* The plaintiff replied, that such a day, year and place, he presented to him his clerk, and he refused, the bishop rejoined, that such a day he presented, and one *J. N. presented also, by which the church became litigious, and after the six months passed* *he*

be made collation by lapse, absque hoc, that he refused after this day; and to this the plaintiff said, that such a day, after this day, he required him to present his clerk and he refused; and by the opinion of the Court this is a departure; for first the bishop justified the special disturbance the day that the plaintiff complains of, and then the plaintiff alleges disturbance at another day, which is a departure. Br. Departure de son ple, pl. 2. cites 33 H. 6. 14.

[541] 17. In *præcipe quod reddat* the tenant said, that J. N. was thereof seised in fee, and that it is devisable, &c. and devised the same land to him in fee and died, by which he entered and gave colour, &c. The plaintiff said that J. N. was seised in fee and died seised, and he entered as heir, and that J. N. at the time of the devise was within the age of 21 years et hoc, &c. The tenant said, that the custom is, that every infant of 15 years may devise his land there, and that J. N. was of the age of 15 years at the time of the devise, &c. and the opinion of the Court was, that the rejoinder is a departure, by which the defendant amended his plea, and put all in the bar, quod nota. Br. Departure de son ple, pl. 9. cites 37 H. 6. 5.

18. In debt upon an obligation the defendant said that it was indorsed, that if the defendant and all the tenants of J. of his manor of D. stand to the arbitrement of the plaintiff of all masters, that the obligation shall be void, and the plaintiff did not make award between the defendant and the tenants, &c. And the plaintiff said, that he awarded such a day that the defendant should pay to the tenants 10l. by such a day, which he has not paid, and after, to be sure, he shewed the names of the tenants, and the defendant said, that they were not tenants at the time of the obligation made, &c. And the other demurred by which he said, that every one of them held an acre of land by 1d. at the time, &c. of the said J. as of his manor of B. and so they were tenants, Priſt, and the others e contra, and the best opinion was that it is no departure to say that they are not tenants, for the bar is, that no award was made, &c. and the other said, that they awarded that they should pay 10l. to the tenants scil. A. and B. and the other said, that A. and B. were not tenants which proves that no award was between the defendant and the tenants of J. and so no departure; nota bene. Br. Departure de son ple, pl. 15. cites 39 H. 6. 6.

19. *Trespass* by a feme of a box of evidences taken; the defendant said, that after the trespass the plaintiff took to baron B. who released to him all actions and demands, and shewed the deed as he ought, judgment, &c. The plaintiff said, that in the release all actions which she might have by the testament of her first husband, are excepted, and that the first husband was possessed, &c. and made her executor, &c. and died, and the plaintiff was possessed till the defendant took them and did the trespass, to which the defendant said, that the first baron was seised of 20 acres of land in B. which the charters concerned, in fee, and died seised, and they descended to the defendant as son and heir to him, and the defendant entered as heir and took the box and charters before that the plaintiff was thereof possessed, et hoc, &c. and this is a departure per Cur.; for the release

release is his bar, and the descent and seisure of the evidences is his rejoinder and therefore a departure; for per Jenny clearly, rejoinder ought to be always a sufficient answer to the replication, and that it be subsequent and in enforcement of his bar, and not to be a new matter; by which the defendant took the rejoinder for his bar, quod nota. Br. Departure de son ple, pl. 16. cites 39 H. 6. 15.

20. A rejoinder ought to have these two properties, that is to say, it ought to be sufficient for answer to the replication, and ought to be subsequent and enforcing of his bar, and not new matter. Br. Departure de son ple, pl. 16. cites S. C. Replication, pl. 26. cites 39 H. 6. 16. per Jenny.

21. As in trespass the defendant pleaded release, the plaintiff replied, that this action is excepted in the release; for it was of a box of charters, the defendant rejoined, that those charters concerned four acres of land in B. of which his father died seised in fee, and he is heir to him, and entered and took the charters, and per Cur. this is an ill rejoinder and departure, by which the defendant pleaded the rejoinder for his bar. Ibid.

22. Trespass upon anno 5. R. 2. the defendant pleaded, that B. was seised and gave to C. and his feme in tail by fine, and that the land descended to O. as heir in tail to the donees scil. son of C. son of C. son to the donees, by which O. entered and P. was seised in tail, and died protestando seised, and P. entered as daughter and heir and had issue the defendant and died, and the defendant entered and gave colour to the plaintiff, to which the plaintiff replied and confessed the fine, and that the land descended to C. brother of O. who entered and gave in tail to the father and mother of the plaintiff who were seised and died seised, and the plaintiff entered and was seised till the defendant did the trespass, and the defendant rejoined, that after the gift made by C. that C. re-entered and died seised, and the land descended as above, and so a remitter, and by the best opinion of the Court this is a departure; for the bar supposes O. heir to the donees immediate, and the rejoinder supposes C. father of O. to be seised so that O. was heir to C. and not heir immediate to the donees, quod nota, by which the defendant waived this pleading. Br. Departure de son ple, pl. 23. cites 1 E. 4. 4. [542]

23. And per Danby J. if a man pleads feoffment in assise in bar, he shall not say in the rejoinder, that it was lease and release; for that is a departure. Ibid.

24. And if bar be made by dying seised without heir as escheat, and the rejoinder is by attainder this is a departure, per Choke J. Ibid.

25. And in assise if the tenant pleads feoffment of J. and the plaintiff says, that he leased to J. for life who infeoffed the tenant by which he entered for the forfeiture, and the tenant says, that after the lease and before the feoffment J. the plaintiff released to O. and his heirs, this is no departure. Br. Departure, pl. 23. cites 1 E. 4. 4.

26. And if recovery be pleaded in assise, and the estate of the plaintiff mesne, &c. and the plaintiff says, that he, against whom the recovery

Co. Litt.
304. 2.
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recovery passed, had nothing at the time of the recovery, and the tenant says, that he was pernor of the profits, this is no departure. Ibid.

27. In assise where the entry or disseisin is supposed to be by two, and the one dies or pleads a plea, and the other pleads another plea and the plaintiff makes title, he shall conclude that both entered upon him, &c. or that he was seised till by both disseised, and shall not say till by the one disseised; for this is a departure from his writ: Br. Patents, pl. 101. cites 12 E. 4. 6. and 7.

28. J. 3. brought writ of forcible entry against N. the defendant said, that A. was seised in fee, *qua* estate he has and gave colour to the plaintiff, and the plaintiff said, that after the defendant had the estate of A. W. B. cousin of the plaintiff was seised in fee whose heir he is, and died seised, and the land descended to him as cousin and heir, &c. and shewed how, &c. by which he entered and was seised in fee till by the defendant disseised, and the defendant said, that before that W. any thing had, the said A. was seised till by J. S. disseised who infeoffed one A. who infeoffed the said W. and that after A. died, and the fee and the right descended to this defendant as to the cousin and heir, and shewed how; and after W. B. died seised this same N. being within the age of 21 years, by which the defendant entered, and demanded judgment, &c. And per Littleton the rejoinder does not maintain the bar, and then it is a departure, for in the bar he said, that A. had possession before the dying seised of W. B. and by the rejoinder he confesses that he had no possession before the dying seised but only a right, and so a departure, by which Catesby demurred in law upon it, &c. Br. Departure de son ple, pl. 7. cites 15 E. 4. 33.

[543] 29. In trespass [of sheep taken] the defendant pleaded sale in market overt by B. and gave colour, and the plaintiff said, that he himself was possessed till the defendant took and delivered them to the said B. who sold them to the defendant, and the defendant said, that the plaintiff sold them to B. and B. sold them to the defendant, and per Cur. this is a departure; for by the bar he is to bind the plaintiff by the sale by the law, without conveying from the plaintiff, and by the rejoinder he conveys from the plaintiff by which he omits the sale in market overt. Br. Departure de son ple, pl. 24. cites 18 E. 4. 24.

30. And in trespass, if the defendant pleads feoffment of B. and gives colour, &c. and the plaintiff says, that he was seised till by B. disseised, and he entered, and the defendant says, that the plaintiff released to him, this is no departure per Brian and Collow; for it is pursuant to the first matter. Ibid.

31. Entry sur disseisin against the baron and feme, the baron said, that E. was seised, and leased to him for life of B. and gave colour, &c. The demandant said, that before that the said C. any thing had, the tenant was seised and infeoffed A. who infeoffed the demandant, who was seised till by the tenant disseised, and after the tenant infeoffed G. who leased to the defendant as in the bar; the tenant said, that E. leased to him at will, and after the tenant infeoffed A. who infeoffed the demandant as in the replication, and after the

the tenant entered upon the demandant, upon whom E. entered; and after leased to the tenant for life, as in the bar, and it was adjudged a good rejoinder and no departure from the bar. Br. Departure de son ple, pl. 25. cites 18 E. 4. 26.

32. Trespass of assault and battery, 1 July Anno 1 E. 5: the defendant justified by the assault of the plaintiff himself at another day, *usque hoc*, that he was guilty before, or after this day, the plaintiff said, that de son tert demesne, &c. this is an ill replication; for by this he departs from his first day and therefore ought to say that guilty *modo & forma*, &c. Br. Replication, pl. 67. cites 2 R. 3. 11.

33. If one intitles himself to land by feoffment of J. S. and defendant pleads that before the feoffment J. S. was attainted, now if the plaintiff shows an act of parliament annulling the attainder; this is no departure; for the matter of the title is not changed, but remains as it was at first, viz. by the feoffment; per Popham Ch. J. Yelv. 14. cites 3 H. 7. Sellenger's Case.

But Gawdy J. contra and took a diversity between actions in which the plaintiff are bound

to a precise form, and in which they are not as in *formedon*. if the demandant intitles himself by a gift, and the tenant pleads *ne dona pax*, the demandant may reply and enforce the count and maintain it by a *recovery in value*, *et sic dedit*, according to 3 H. 7. 5. and this is no departure, because the plaintiff in *formedon* is bound to a precise manner and form of counting; but in action upon the case it is otherwise; for as his case is, so the plaintiff must declare, and consequently in this case the plaintiff should have declared upon the letters patents, and have shewn the statute of resumption and the statute of 4 H. 7. of reviver in his declaration; for now he enforces the matter of his declaration by a statute which is another and a new thing; quod Curia negavit. Yelv. 14 & 15. in case of Wood v. Haukshead.

34. *Quare impedit* against the Bishop of E. who said that he is ordinary and that he claimed nothing but admission and institution as ordinary, judgment, if without special disturbance action, &c. the plaintiff said, that he was seised of the advowson, and presented his clerk, who was admitted, and now the church voided by his death, by which he, the 20th day of May, presented his clerk to the defendant as ordinary, and he refused him within six months at B. in the county of N. and so he disturbed him, to which the Bishop said that the 13th day of May aforesaid, one P. presented to him D. his clerk as patron, and after the plaintiff presented as in the bar by which the church became litigious, and demanded judgment, and the plaintiff demurred, and by some this is a departure; for by the first plea the plaintiff might have had writ to the Bishop, contrary upon the rejoinder of the Bishop, therefore a departure, and the others *e contra*, therefore *quare*. For the one plea and the other belong to the ordinary. Br. Departure de son ple, pl. 19. cites 5 H. 7. 19.

Br. Responder, pl. 34. cites 3. C.

35. Trespass of goods taken at L. the defendant said, that J. S. was possessed *ut de proprio*, and bailed them to the plaintiff and after gave them the defendant, by which he took them, judgment, &c. The plaintiff said, that he himself was possessed till J. S. took them out of his possession and gave them to the defendant and the plaintiff took them after the gift and was possessed till the defendant took them, and the defendant rejoined that the plaintiff himself after the taking of J. S. gave the goods to J. S. who gave to the defendant, as in the bar. And it was held that the replication is good, and the owner may retake the goods, notwithstanding the gift of the trespassor, and may retake them, or have replevin, and per Vavisor and

[544] Fitzh. De. parture, pl. 10. cites 3. C.

Brian this is a good rejoinder, and neither a departure or repugnant, for it stands with the bar and enforces the bar. Br. Departure de son ple, pl. 21. cites 6 H. 7. 8.

Br. General Brief, pl. 19. cites S. C. 36. In formodon, the tenant said, that he dona pas, the demandant said that other land was given, and this land was recovered in value and so dona. Br. Departure de son ple, pl. 22. cites 7 H. 7. 2.

Br. General Brief, pl. 19. cites S. C. 37. And the like in cui in vita, that vir dimisit, &c. the tenant said, that non dimisit, and the demandant said, that he suffered a recovery, and so demised, and no departure; for there is no other form of writ, &c. Ibid.

38. In assise the tenant pleaded feoffment of J. S. and gave colour, the plaintiff said, that at the time of the feoffment he was within age and entered at full age and insoffed the plaintiff, &c. the plaintiff said that the custom of the same vill is, that every one of the age of fifteen years may make feoffment, the plaintiff said, that this is a departure, Newport said no, and put a difference between the case 37 H. 6. Fol. 5. and this case; for there the tenant pleaded drouse bar, which is a custom at the common law, and after in his rejoinder he alleged special custom in the same vill only, and therefore because his bar was of a custom and he did not shew the whole custom in his bar, therefore this is a departure, but here the bar is a feoffment, which the plaintiff voided by nonage, therefore the defendant came time enough to allege the custom and in enforcement of the bar, and Rede and Tremaille J. affirmed the difference which Newport put, quod nota, and quare. Br. Departure de son ple, pl. 10. cites 21 H. 7. 17.

39. Office was found for the king, and that the tenant of the king made feoffment to his use, and died seised of the use, &c. and J. S. came and traversed the office, inasmuch as the feoffment was to another use and that recovery was had to this second use, and traversed the dying seised in use, and the king's attorney replied, that the recovery was by covin, and per Rede J. this is a clear departure, for as a common person ought to warrant his count by pleading and also his bar, so the king, when he is intitled to the office which is traversed, ought to enforce himself to the same office by his replication, and maintain the same title in the office, and not to make a new title by matter in fact, or otherwise; for this was never found by matter of record, and also it is a new title which is not found in the office or in any other office, quod non negatur. Br. Departure de son ple, pl. 11. cites 21 H. 7. 18.

[545]* 40. In avowry, if the plaintiff counts that his father was seised and leased rendering rent, or granted a rent charge, and the defendant avows the defendant indebted, or the plaintiff in replevin says, that the lessor or grantor at the time of the demise, or at the time of the gift had nothing in the land, the other party cannot say that at the time, &c. J. and B. were seised in fee to his use, and so seised he leased or granted; for all this ought to be shewn in the count or avowry, per Rede, Ch. J. and * Kingmill J. and therefore it seems clearly a departure, quod nota. Br. Departure de son ple, pl. 12. cites 21 H. 7. 25.

Br. Pleadings, pl. 46. cites S. C. that the plaintiff cannot maintain the matter by replication or rejoinder to shew the use. — S. C. cited per Cur. Pl. C. 109. b. Mich. 2. Mar. in case of Fulmerstone v. Steward, and said it was a departure; because by the avowry it shall be intended that the father was seised in

in fee, and that the grant was good by the common law, whereas now by the rejoinder the defendant does not maintain it, but would enable himself by the statute of uses, and so would aid himself by the statute law. — Litt. Rep. 215. cites S. C.

41. Forfeiture of marriage; the plaintiff counted that the father of the defendant held of him in chivalry and died in his homage, and the defendant said that his father made feoffment, *absque hoc* that he died in his homage, and the plaintiff said that this feoffment was to the use of him and his heirs, and so the heir in ward by the statute 4 H. 7. and the defendant said, that this feoffment was to the use of his feme till she came to twenty-one years, and after to the use of the heir in tail and remainder over, &c. the remainder over in fee to his right heirs. And per Fitzherbert and Willoughby clearly this rejoinder is a departure; for he might have pleaded this matter at first and did not. Quod Nota. Br. Departure de son ple, pl. 1. cites 27 H. 8. 3.

42. In replevin, the avowant set forth, that long before the taking one J. S. was seised of the lands in fee, and made a lease to the avowant for thirty years, and avowed damage feasant; the plaintiff replied, that the said J. S. was only tenant in tail, &c. and conveyed the descent to himself as heir in tail, and that he entered upon the lessee, &c. the defendant rejoined, that the said J. S. reserved a rent on the said lease, which rent the plaintiff, as son and heir, had accepted after the death of his father, judgment, &c. And this was held a departure. The Reporter adds, *quære bene*. D. 95. b. pl. 40. Mich. 1 M. Anon.

Nelf. Abr. 637. pl. 1. cites S. C. and observes that by this plea he justified under a lease made by tenant in fee, and in his rejoinder, he sets forth

the acceptance of the rent reserved upon a lease made by the tenant in tail.

43. Lease for years by indenture without impeachment of waste, in which the defendant covenanted that at every fell of wood he would make a fence to save the spring, and gave bond for performance of covenants, in debt brought on this bond, the defendant pleaded, that he had not felled any wood, &c. the plaintiff replied, and set forth, that he had felled two acres of wood, but had not made any fence to save the spring; the defendant rejoined, that he had made a fence, &c. and so to issue; this was held a joconfail and a departure. D. 253. b. pl. 101. Trin. 8 Eliz. Anon.

44. In trespass for chasing his beasts in Berkshire, defendant justified damage feasant; the plaintiff replied, that afterwards he drove the cattle into Oxfordshire and sold them, defendant demurred, and the declaration was in Berkshire, yet the sale made him tort-feasor *ab initio*. For where the replication maintains the title and only removes the impediment, it is good. Arg. Litt. Rep. 215. cites Mich. 23 & 24 Eliz. C. B. Rot. 2297. Pledall v. Clark.

45. Debt upon a bond for performance of an award, which was to pay to the plaintiff 10l. and to do divers other things. The defendant pleaded performance, and shewed how. The plaintiff replied, and assigned the breach in non-payment of the 10l. The defendant rejoined, that he tendered it to the plaintiff, and he refused it. It was the opinion of Dyer, that this is a departure; for in the bar the defendant pleads performance, and shewed how; and now in the rejoinder, he pleads a tender and refusal, * which is not a per-

[546] * So where the rejoinder was, that he was ready to pay, and to do the other thing (which was to seal a release) it was

adjudged a departure; for the pleading performance is the same thing as pleading payment, &c. and then when he rejoins, that he is ready to pay, &c. he by this relinquishes his first plea, and judgment for the plaintiff. Sid. 10. pl. 6. Mich. 13 Car. 2. C. 8. *Butcher v. Whiting*.

46 *Trespass for entering into his house, and breaking his close*; the defendant pleaded, that it was his freehold; the plaintiff replied, that the place and close in which the trespass was supposed to be done, est unum messuagium and so made a title to the messuage. Upon not guilty, it was found for the plaintiff, but because he made title in his replication to the messuage only, and did not maintain his declaration, which was for the messuage and close, judgment was, quod nil capiat per billam. But the Reporter says, quære, if it amounts not to a discontinuance of the close only, and so helped, by verdict. Goldsb. 159. pl. 89. Hill. 43 Eliz. Anon.

47. In case for taking toll of the plaintiff for passage over the bridge of W. shewing a title by letters patents 20 H. 6. to All Souls College in Oxford for them their tenants and farmers to be quit of toll, setting forth, that he was farmer to the college, &c. the defendant pleaded in bar the statute 28 H. 6. of resumption of all liberties, &c. granted by him; the plaintiff in his replication set forth the statute 4 H. 7. by which the letters patents granted by H. 6. to the college were made good, non-obstante the statute 28 H. 6. &c. and upon demurrer it was objected, that this replication was a departure from the declaration, but a judged, that it is not; for there is not any new matter contained in the replication different from what was in the declaration, for the plaintiff's title still remains upon the letters patents, and relies upon it; and the title shewn in the declaration and replication, is all one, viz. the letters patents. Yelv. 13. Mich. 44 & 45 Eliz. B. R. *Wood v. Hawkhead*.
as shewn to the Court, but mentions it as Mich. 42 & 43 Eliz. Rot. 397, by the name of Woodhead's case, and that it was held to be no departure, but, as it were, a confession and avoiding. — Jo. 261. 263. *The College of Physicians v. Butler*. S. C. & S. P. resolved accordingly.

48. If a man pleads performance of covenants, and the plaintiff replies, that he did not such an act according to the covenant, the defendant says, that he offered to do it, and the plaintiff refused it, this is a departure, because the matter is not pursuant; for it is one thing to do a thing, and another to offer to do it, and the other refused to do it; therefore that should have been pleaded in the former plea. Co Litt. 304. a.

49. When a man in his former plea pleads an estate made by the common law, in the second plea regularly he shall not make it good by an act of parliament. So when in his former plea he intitles himself generally by the common law, in his second plea he shall not enable himself by a custom, but should have pleaded it first. Co Litt. 304. a.

Covenant upon an indenture of apprenticeship. The defendant pleaded in *Jancy* he plaintiff replied, that by the custom of London, infants after the age of 14, might bind themselves apprentices; and upon demurrer, *Foster Cl. J.* and *Windham J.* held, that this was not a departure, but *Twiften* and *Mayer J.* contra, and held, that what is pleaded generally, as at common law, cannot be maintained by custom, but it is a departure. Lev. 81. Mich. 14 Car. 2. B. R. *Mole v. Wallis*, or, *Bold v. Warren*. — Sid. 142. pl. 19. *Bold v. Wallis*. S. C. and the Court were divided in

in their opinion, and therefore advised a discontinuance, and the plaintiff to declare de novo upon the custom.——Raym. 60. Mould v. Wallis. S. C. adjournatur.——Keb. 376. pl. 76. S. C. adjournatur.——Ibid. 469. pl. 78. S. C. adjournatur.——Ibid. 513. pl. 85. S. C. the Court gave leave to discontinuance, and begin de novo, and count on the custom.——S. P. Godb. 122. pl. 143. Hill. 29 Eliz. Wray Ch. J. was of opinion, that it was no departure; for he said, it should be frivolous to shew the whole in his declaration, viz. that he was an infant, and that by the custom he might make a covenant which should bind him; but the Reporter says, quære of this opinion, for that many doubt of it.

The rule was agreed, that upon a declaration grounded upon a fact at common law, one cannot maintain it by replication of a custom or statute; as in covenant upon an indenture of apprenticeship, the defendant pleads infancy, &c. the plaintiff cannot maintain his declaration, by saying, that there is a custom that infants may bind themselves apprentices, &c. a Ld. Raym. Rep. 863. Pasch. 2 Ann. B. R.

50. In trespass for chasing his beasts, 14 May, 1 Jac. the defendant justified as for estray, and that 16 May, 1 Jac. he delivered them. The plaintiff replied, that 15 May he laboured and worked them. The defendant demurred. This was held no departure, but the working maintained the trespass done the 14th, and made him a trespassor ab initio. Arg. Litt. Rep. 215. cites Hill. 4 Jac. Bagshaw v. Gower. Yelv. 96. Bagshaw v. Gaward. S. C. and held no departure.——Cro. J. 147. pl. 6. S. C.——S. C. cited Ld.

Raym. Rep. 76. Pasch. 8 W. 3. C. B. by Powell jun. J. that it fortifies the declaration.

51. Debt upon bond for non-performance of an award; the defendant pleaded, that the award was, that he should release all suits to the plaintiff, which he had done; the plaintiff replied, that it was true such an award was made, but that the arbitrators did farther award, that the defendant should pay unto the plaintiff 15l. at such a time and place, absque hoc, that they had made such an award only, as the defendant had alledged; the defendant rejoins, that true it is, that they did award, that he should pay the plaintiff such a sum; but they did farther award that the plaintiff should release to the defendant all actions, &c. which he had not done; and upon demurrer, the Court seemed clear of opinion, that the rejoinder of the defendant is a plain departure; for that he might (and so ought) to have shewed all this at the first. 2 Bullst. 38, 39. Mich. 10 Jac. Linsey v. Aston.

52. On trespass for an assault, battery and imprisoning the plaintiff on the last day of October, 6 Car. at W. the defendant justified, for that 13 Aug. 6 Car. a supplicavit issued out of Chancery, and by a warrant from the sheriff, he, on the 21st day of September, arrested the plaintiff, and detained him two days, and then delivered him to the sheriff, &c. the plaintiff replied, and confessed the writ, warrant and arrest 21 Sept. and imprisonment for two days, and then sets forth, that afterwards he gave bail to the sheriff, and was discharged; and that the defendant postea, viz. præd' 1 Die Oct. 6 Car. assaulted and imprisoned him of his own wrong; and upon demurrer, all the Court conceived, that the replication was not good, by its varying from the day in his declaration, and is a departure therefrom. Cro. C. 228. pl. 6. Mich. 7 Car. B. R. Tyler v. Wall.

53. In replevin the defendant avowed the taking in O. for a rent charge granted out of the manor of S. which extended into S. and O. The plaintiff replied, that she recovered in dower, and had a third part, &c. assigned in S. and so was seised as tenant in dower, till the defendant

defendant distrained her beasts in a place called the Warren in S. Upon demurrer the Court held, that this was a departure; and agreed, that in every replication there ought to be a vill, and a lieu conus, and that here the Warren is the lieu conus, and S. is the vill, and therefore cannot be in O. where the avowry is made, because one vill cannot be in another vill, nor one lieu conus in another lieu conus, and here O. shall be intended a vill; then in this replication S. must be a vill, or no vill, if it be not a vill, the replication is not good, because a vill is wanting; and if it is a vill it cannot be in O. because one vill cannot be in another; and judgment for the defendant. Sid. 9. pl. 5. Mich. 12 Car. 2. C. B. Weston v. Carter.

[548] 54. If one *pleads a statute*, and the other *replies*, that it is *repealed*, the defendant may *rejoin*, that it is *revived by another statute*; agreed per Cur. Lev. 81. Mich. 14 Car. 2. B. R. in case of Mole v. Wallis, or, Bold v. Warren.

S. C. but S. P. does not appear. — Keb. 469. pl. 78. S. C. and S. P. by Twifden.

Keb. 469. pl. 78. S. C. & S. P. mentioned as by Twifden, that in such case it is a departure. 55. If defendant *pleads a statute*, and the plaintiff *replies*, that it *was to continue to such a time only, which is expired*, the defendant may *re-join*, that *the first statute was afterwards made perpetual*; because it is no more than fortifying the first matter; agreed per Cur. Lev. 81. Mich. 14 Car. 2. B. R. in case of Mole v. Wallis, or, Bold v. Warren.

Raym. 22. S. C. adjudged a departure. 56. In *covenant, &c.* the lessee *pleaded performance generally*; the plaintiff *replied*, and *assigned a breach in non-payment of rent*; the defendant *rejoined*, that *the plaintiff had ousted him, and held him out, &c.* upon several arguments the Court held, that this is a departure, because *the rejoinder is not in affirmance of the plea*; but the defendant *ought to have pleaded this special matter at first*. Sid. 77. pl. 10. Palch. 14 Car. 2. B. R. Granger v. Henborow.

Keb. 560. 578. S. C. Lee v. Raynes. Raym. 86. S. C. — Arg. 10. Mod. 251. 57. *Assumpsit* upon a promise 1 May, 3 Car. 1. for money lent. Defendant *pleads*, that *the writ was first brought 4 Feb. 14 Car. 2.* and that he did not promise within six years before the said 4th of February. After verdict it was moved in arrest of judgment, that the declaration is a departure from the count. But adjudged, that it was not a departure, for the *time put in the declaration was not material*, for he might declare of assumpsit at any time. But when the defendant made the time material by his plea, the plaintiff may by his *replication answer to this plea, to maintain his action for the time, which before was not material*, and the plaintiff had judgment. Lev. 110. Mich. 15 Car. 2. B. R. Lee v. Rogers.

It is no departure, for it is only an answer for the time to the plea, which before was not material. Lev. 111. Hill. 15 Car. 2. C. B. cites it in the case of Lee v. Rogers, as adjudged, as he heard, in the case of Bremion v. Evelin.

S. C. of Lee v. Rogers was cited per Parker Ch. J. in delivering the opinion of the Court, and judgment accordingly, but he cited it by the name of Lee v. Raynes; and he said, that in the old books indeed, this would have been a departure, and cited as Aff. 86. and that unless that what, strictly speaking, is a departure, be *some times allowed*, unless the plaintiff (*where the defendant by his justification, makes the time or place material*) may follow the defendant's plea, though it leads him to another time or place, all that doctrine, that in *transitory actions* where time and place are not

not material the plaintiff may declare at any time or place, must fall to the ground. Hill, 3 Geo. 1. B. R. 10 Mod. 349. Cole v. Hawkins.

58. In debt on a bond conditioned to perform an award, the defendant pleaded *nullum fecerunt arbitrium*. The plaintiff replied and shewed an award. The defendant rejoined, that there were other things submitted, and so no award. Adjudged on demurrer, that this is a departure; for the defendant ought to have pleaded this special matter in his plea at first. Sid. 180. pl. 16. Hill. 15 & 16 Car. 2. B. R. Morgan v. Man.

Raym. 94. S. C. it was insisted that it was a departure, because the defendant cannot rejoin concerning an

award, when he has pleaded before, that there was no award, and for the departure judgment was given for the plaintiff. — Keb. 678. pl. 72. S. C. adjudged for the plaintiff. — Lev. 137. S. C. and per Cur. nul award is no award at all; and held this a departure: and judgment for the plaintiff. — Ibid. the Reporter adds, that judgment was given in a like case. Mich. 14 Car. 2. B. R. Horle v. Launder.

59. In *assumpsit* for 5000 royals, the defendant pleaded the statute of limitations; the plaintiff replied, and tendered an issue as to parcel, and as to the residue, he said, the defendant was indebted to him at Tenerife in the Canary Islands, in warda de Cheap, &c. and upon a demurrer to this replication, it was objected, that it is a departure, because the plaintiff had declared for a debt due in London, and in his replication he alledges it was at Tenerife; but adjudged that it is no departure, because it is a personal thing, for he who is indebted to me in one place, is so in every place. Sid. 228. pl. 24. Mich. 16 Car. 2. B. R. Bevin v. Chapman.

[549]
Lev. 142.
Seven v.
Chapman.
S. C. ad-
judged.

60. Debt upon a bond. The condition was to save a parish harmless from the charge of a bastard child. The defendant pleaded *non damnificatus*. The plaintiff replies, that the parish had laid out 3s. for keeping the child. The defendant rejoins that he tendered the money; and the plaintiff paid it *de injuria sua propria*. Whereupon it was demurred, Twisden said, the rejoinder is a departure; you should have pleaded thus, viz. that non fuit damnificat' till such a time; and that then you offered to take care of the child, and tendered, &c. Judgment for the plaintiff, nisi, &c. Mod. 43, 44. pl. 97. Hill. 21 & 22 Car. 2. B. R. Richards v. Hodges.

a Sound.
83. S. C.
adjudged
clearly a
departure.
— Sid.
444. pl. 1.
S. C. ad-
judged a de-
parture. —
a Keb. 612.
pl. 53.
S. C. ad-
journalur.
Ibid. 619.

pl. 7. S. C. held a departure, and judgment for the plaintiff.

61. Debt upon bond conditioned, that if the defendant served the plaintiff as a brewer's clerk, and performed such covenants, then the bond to be void; the defendant pleads performance of all, &c. The plaintiff replied, that one of the covenants was to give to the plaintiff a true account of all money which he should receive, &c. which he had not done; the defendant rejoined and confessed that he received such a sum, &c. and that he laid it up in the plaintiff's warehouse, it was stolen by certain malefactors, to him unknown, et hoc paratus est verificare; upon demurrer it was objected, that it was a departure from the plea, because that was, that he performed all the covenants, one whereof was to account, but the rejoinder is rather an excuse why he should not account; adjudged no departure, but a fortification of the bar; for shewing that he

a Lev. 5.
S. C. says
the rejoinder
was, that he
accounted
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house, and
stole it,
whereof he
acquainted
the plaintiff,
et hoc pa-

was

factis et verificare; upon which the plaintiff demurred. The Court held it no departure. And as to the conclusion, they held it better than to have concluded to the country; because, now the plaintiff has liberty to traverse the robbery; sed adjournatur. But afterwards in Trin. Term, the demurrer was waived, and issue taken upon the robbery.——2 Keb. 761, pl. 30. S. C. says, that in the rejoinder it was expressed, that he gave notice of the robbery the next day after the night it was done in, and being then required to account, he did thus give an account; and the Court held it no departure.——S. C. cited 6 Mod. 199, and allowed to be law; and that the rejoinder that he was robbed of the money, whereof he gave notice to the plaintiff, certainly maintains the first plea; for it was a legal account of it.

62. Debt upon bond for performance of covenants, the defendant in his plea set forth the indenture, which was to return all the effects of goods sent to Barbadoes, and that he had performed all the covenants; the plaintiff replied, that such goods were sent, of which he had not returned the effects; the defendant rejoined, that he had no order to return them, and upon demurrer this was adjudged a departure, because there was nothing of order mentioned in the covenants; but per Hale if the covenant had been to return them on order, the plea had been good. The Reporter adds two queries.

[550]*

s. Barnard.
Rep. in
B. R. 193.
Mich. 6
Geo. 2.
Winchelsea

2 Lev. 67. Mich. 24 Car. 2. B. R. Wood v. Kirkham.
63. A covenant is to pay, the defendant pleads performance, the plaintiff replies that he did not pay; the defendant rejoins that he tendered. *This is a departure, cited by Serjeant Jones. Freeman. Rep. 157. pl. 174. Pasch. 1674.

(Countess) v. Higden. S. P. adjudged for the plaintiff that it is a departure; for the matter in the rejoinder goes only by way of excuse. Tender and refusal not being payment, but only discharges the party from damages.

In the case above was cited the case of *Owen v. Reynolds*; the same term in C. B. where the action was debt on bond, with condition to save the plaintiff harmless from tonnage of coals, the defendant pleaded non damnificatus; the plaintiff replied, a distress taken for it; the defendant rejoined, that none was due. Upon this there was a demurrer; but that Court held it to be no departure. The Ch. J. agreed that case to be law; and said, that the rejoinder there fortified the bar.

64. Debt upon bond conditioned to pay such sums as the obligor should receive within 14 days after receipt at such a place in W. as the plaintiff (the obligee) should appoint; the defendant pleaded payment; the plaintiff replied non-payment of such a sum received by the defendant at a place by the plaintiff appointed; the defendant rejoins, that the plaintiff had appointed no place; upon demurrer this was adjudged a departure, for the defendant in his plea ought to have pleaded first, that he had paid all but such a sum, for which, as yet, the plaintiff had appointed no place of payment. 2 Mod. 31. Pasch. 27 Car. 2. C. B. Sams v. Dangerfield.

65. In debt on an award, the defendant pleaded nullum fecerunt arbitrium, plaintiff replied, and set forth the award, that the defendant should pay 20l. to the plaintiff in satisfaction of all trespasses; and likewise that they should give mutual releases to the time of the award, and assigns breach in non-payment of the 20l. Defendant rejoins, that there were trespasses done between the submission and the award. All the Court were of opinion, that when the plaintiff in his replication set forth the award, it was no departure to shew that trespasses were committed betwixt the submission and the award; for by that the award appears to be void, and so fortifies the

the bar of nullum arbitrium. Freem. Rep. 265, 266. pl. 290. Mich. 1679. Ayland v. Nicholls.

66. Debt upon a bond for performance of an award, the defendant pleaded no award made; the plaintiff replied and set forth the award made, that the defendant should pay the plaintiff 250*l.* in right of his wife, as a full moiety of the share of the estate of H. P. her father, and that upon payment thereof the parties should seal general releases, but that the defendant has not paid the money awarded; the defendant rejoins, and sets forth that he and the plaintiff differed about all the personal estate of H. P. which they submitted to arbitrators, but that the award by them made was not of all the personal estate of the said H. P. Upon a demurrer the Court was clear of opinion that this rejoinder was a departure from the plea; and the plaintiff had judgment. Lutw. 382. 385. Mich. 1 Jac. 2. Mitchell v. Pope.

67. Debt upon bond, conditioned, that if the defendant paid the plaintiff or his attorney all the charges of a suit, &c. with which the said attorney should charge the plaintiff, and should discharge the plaintiff thereof, then the bond to be void; the defendant pleads, that he had paid to the plaintiff all the said charges; the plaintiff replied, that the attorney had charged him with 4*l.* 16*s.* which the defendant had not paid, nor discharged the plaintiff thereof; the defendant rejoins, that the attorney had not delivered to the defendant any bill of costs under his hand, as by the statute required; upon demurrer the Court held the plea to be too general; for he should have shewed that the attorney charged so much and no more, which he had paid, and all agreed that the rejoinder was a manifest departure from the bar, for he pleaded, that he paid all the charges, &c. and by his rejoinder he would excuse the non-payment, because the attorney had not delivered him a bill of costs under his hand. Lutw. 419. 421. Trin. 4 Jac. 2. Parkes v. Middleton.

68. Trespass for breaking his house, and taking and carrying away his goods; the defendant justified the taking and carrying away nomine districtionis for damage feasant; the plaintiff replied, that after the distress aforesaid, viz. eodem die, &c. the defendant converted them to his own use; upon demurrer it was insisted, that this replication was a departure; for it does not make good the plaintiff's replication in trespass, but shews rather that the plaintiff should have brought trover and conversion; sed non allocatur; for he that abuses a distress is a trespassor ab initio, and therefore if in trespass the defendant justifies nomine districtionis the plaintiff may shew an abuse and it is no departure, but makes good his declaration, and so in this case; for the converting is a trespass or trover at election, and the matter disclosed in the replication makes good this election; for it proves a trespass as well as a trover. 1 Salk. 221. pl. 1. Hill. 2 W. and M. in C. B. Gargrave v. Smith.

69. In debt upon bond for performance of covenants in a lease, one whereof was to pay so much clear of all taxes, the defendant pleaded performance; the plaintiff replied, non-payment of so much for half a year's rent; the defendant rejoined, that so much was paid 11 Mod. 84.
S. C.
adjudged
according-
ly for the
plaintiff.

is money, and so much in taxes upon the statute for laying 4s. per pound on land, which being allowed amounted to the whole. Holt Ch. J. upon demurrer held that the matter of this rejoinder being by way of excuse, ought to have been set forth in the bar; but as it is here, it is a departure; for whereas he said at first, that he had performed the covenants, he says now, that he is not obliged to perform them. Judgment for the plaintiff. 1 Salk. 221. pl. 2. Trin. 5 W. & M. in B. R. Arran (Countess of) v. Crispe.

70. In trespass for taking his cattle in the king's highway, the defendant justified the taking, &c. damage-feasant; the plaintiff replied, that time out of mind, &c. there had been a certain house and foot-way pro omnibus inter such and such a place, and that he drove his cattle over the way, and that en passant they eat, &c. The defendant rejoined, that the cattle were commorant in via prædicta. Issue was joined thereupon and found for the plaintiff. It was moved for a repleader, the trespass tried being not the same trespass for which the plaintiff had declared. Per Holt Ch. J. This was a transitory trespass and the mentioning it as done in alta via regia was nothing to the purpose, but was idle, out of time and mere surplusage; and therefore the plaintiff, by following the defendant to another way in his replication, does not depart, for a departure must be from something material; and when the issue is taken upon the commorancy, it admits the plaintiff had a way, but that he continued longer than he should in it. Judgment for the plaintiff. 1 Salk. 222. pl. 3. Pasch. 6 W. and M. in B. R. Primer v. Phillips.

71. In trespass, if the defendant justifies on the day in the declaration, the plaintiff may alledge another day in his replication. Per Holt Ch. J. 1 Salk. 222. pl. 4. Mich. 7 W. 3. B. R. Webley v. Palmer.

Comb. 281. S. C. and the exception was not allowed; for the plaintiff may well divide it in his replication, if there are four several causes of four several days, the plaintiff may lay them all at one time, and if he is forced from his day, it is no departure. Judgment for the plaintiff.

72. Case, &c. for work done, and six several promises were all laid upon 16th October, the defendant pleaded infra ætatem to all generally, the plaintiff replied as to two of the promises præcludi non debet, &c. because the defendant was at that time of full age, and as to the rest they were for his necessary apparel; defendant demurred, alledging that it was repugnant, because the defendant could not be of age and not of age at one and the same; but adjudged, that the time was only a circumstance and not material nor part of the issue, nor is the plaintiff tied to a precise day in his declaration, and if the defendant, by his plea, forces him to vary, it is no departure. 1 Salk. 223. pl. 5. Pasch. 8 W. 3. B. R. Howard v. Jennison.

[552]
Lutw. 111.
114. Laugh-
ton v. Ward.
S. C.

73. If the plaintiff discloses new matter in the replication, which new matter only fortifies the declaration, this is not any departure. Ld. Raym. Rep. 75. Pasch. 8 W. 3. C. B. Lawton v. Ward.

74. Trespass

74. Trespals, &c. for an assault, &c. at H. the defendant pleaded that he was possessed of a close at T. and that the plaintiff entered, and refusing to depart, the defendant, molliter manus imposuit on him to maintain his possession, and traversed the assault, &c. at H. The plaintiff replied, and claims a way over the close to T. by prescription and that the defendant adtunc & ibidem brake the plaintiff's head, and traversed that he molliter manus imposuit, &c. prout, &c. and upon demurrer exception was taken that this replication was a departure from the declaration which was of an assault, &c. at H. and the replication admits that it was at T. but it was answered that it is a transitory action, and if the defendant makes it local by his plea, the plaintiff may answer the plea, and it will be no departure. And of this opinion was the whole Court; for in transitory actions the plaintiff may lay it where he pleases, and if the defendant makes it local by his plea, the plaintiff may vary in his replication either in time or place. And judgment for the plaintiff. Ld. Raym. Rep. 120, 121. Mich. 8 W. 3. Serle v. Darford.

Nottinghamshire, the defendant pleaded, that A. was seised of a place called W. in North H. in the same county, and made a lease thereof to the defendant, by virtue of which he entered, and as lessee he justified the taking of the goods, as damage feasant, and traversed the taking at East R. The plaintiff replies, that before A. was seised of that place, &c. in fee, J. S. was seised of the place, &c. in fee, and leased to the plaintiff's father, who entered and put in his goods, that the defendant of his own wrong took them, absque hoc, that A. was seised in fee prout; the defendant demurred, supposing this to be a departure, but judgment was given for the plaintiff, for the reason aforesaid. Arg. Ld. Raym. Rep. 121. Mich. 8 W. 3. in Case of Serle v. Darford, citat. Trin. 23 Car. 2. C. B. Rot. 795. Taylor v. Gabetus.

75. If a man lays a day in his declaration that is not material, and the defendant by his plea makes it material and then the plaintiff in his replication varies from the day in the declaration, it will be a departure, otherwise if the day had not been made material by the plea. Per Holt Ch. J. 6 Mod. 115. Hill. 2 Ann. B. R. Anon.

76. In trespals, assault, and battery, if the plaintiff lays the assault one day, and the defendant pleads a special matter that justifies at another day, whereby the day becomes material, the plaintiff may reply an assault at another day; and it is no departure, although it has been otherwise held, for the day is not material, and the plaintiff may maintain his count; per Holt Ch. J. 2 Ld. Raym. Rep. 1015. Hill. 2 Ann. Anon.

77. In debt on the recognizance of the bail, the defendant pleaded that there was no capias ad satisfaciendum prosecuted and returned against the principal before the day of exhibiting the bill against the new defendant. The plaintiff replied, that a capias ad satisfaciendum was sued out, and returned before the exhibiting this bill. Defendant rejoined that the defendant in the first action brought a writ of error on the judgment before the ca. sa. was prosecuted returned and filed. Upon demurrer it was adjudged for the plaintiff, because the rejoinder is a departure from the bar. 2 Ld. Raym. Rep. 1256. Pasch. 3 Ann. B. R. Parkins v. Wilson.

for the plea is that there was no capias; and the rejoinder says, that there was a capias, but it was superceded, and there is great difference between no capias and a capias superceded; for the superceding

1435. 1437. S. C. resolved accordingly. — If defendant by his plea makes a transitory action local, the plaintiff may answer the plea, and it will be no departure. As in trespals by executor, de bonis asportatis in vita testatoris apud East R. in

6 Mod. 199. Parkins v. Woolaston, S. C. adjudged a departure; for it is new matter which does not agree with or impose the matter of the plea;

superceding does not make it null or in capias, but only suspends the fruit or effect of it, and one must distinguish between the writ itself and the effect of it.

78. In debt on *bond* conditioned that J. L. should be a true prisoner without making any escape. The defendant pleads that J. Larkin did remain a true prisoner without committing any escape, &c. Plaintiff assigns breach that 13 Jan. J. L. made an escape; defendant rejoins that J. L. went a little way out of the rules of the prison, but being sent for back by the plaintiff he immediately returned, with consent of the plaintiff, was accepted as his prisoner, and so continued ever since; to which it was demurred; this is a departure; for if this would excuse the escape, it should have been pleaded at first; so judgment for the plaintiff. Comyns's Rep. 553, 554 pl. 230. Trin. 9 & 10 Geo. 2. in C. B. Gambier v. Larkin.

2d. Raym. Rep. 1449. White v. Street, S.C. the defendant rejoined pro confesso that the plaintiff kept the defendant's books out

79 The plaintiff brings an action of debt upon a bond; defendant pleads the condition, which was that he should execute such an office without the assistance of the plaintiff, and says, that he did execute it without his assistance; plaintiff replies that he did not execute it without his assistance; defendant rejoins, and says, that if the plaintiff did give him his assistance, it was voluntary. To which the plaintiff demurs. And the demurrer was held to be good, for that the rejoinder was a departure from the plea. Barnard. Rep. in B. R. 4. Mich. 13 Geo. Whight v. Clever.

of his custody without his consent from the 22d of April 1725. to the 24th of June next following at libros illos semper abinde detinuit, custodivit, & illis eidem Willielmo deliberare denegavit, per quod the defendant, after the detaining of those books out of his custody, the money, &c. singly could not collect; for plea says, quod verum est that the plaintiff in propria persona sua exercuit officium prædictum a prædicto 22 die Aprilis anno supradicto usque prædictum 24 diem Junii sed quod prædictus the plaintiff voluntarie suscepit & officium prædictum a toto tempore prædicto exercuit sine requisitione vel assensu prædicti the defendant, qui per totum tempus prædictum semper paratus fuit & obtulit to the plaintiff, apud Londinum prædictum in parochia & warda prædictis dictum officium ad exercendum singulus, Anglice singly, sine auxilio prædicti the plaintiff; & hoc idem the defendant paratus est verificare, &c. The plaintiff demurred specially, and shewed for cause, that the rejoinder was a departure from the bar; the defendant joined in demurrer. The Court was clear of opinion, that the rejoinder was naught; for if the fact there disclosed amounted to shew, that the defendant had executed the office singly, the defendant ought to have joined issue with the plaintiff upon the issue offered by him in his replication, and given this matter in evidence; but if the fact set out in the rejoinder was only an excuse for the defendant's not having exercised the office as the Court took it to be; then it was a departure from the bar; and the defendant ought not to have pleaded, that he did execute the office singly, and rejoin this matter; but ought to have pleaded this matter at first. Judgment for the plaintiff, Nov. 3. 1726.

For more of Departure in general, see other proper Titles.



Depositions.

(A) Depositions read in what Cases.

1. **A** PERSON was examined as a witness in a cause, and after became plaintiff for the interest in that business; allowed and not to be suppressed. Toth. 211. cites 9 Car. Drury v. Drury.

2. A witness examined for the plaintiff, and to be cross-examined for the defendant, but before he could be cross-examined, died; yet this Court ordered his depositions to stand. 2 Chan. Rep. 18. 20 Car. 2. & 22 Car. 2. Mosely v. Maynard. [554]

3. Proofs in an original cause were not allowed to be read on a bill of review. 2 Chan. Rep. 18. 20 Car. 2. & 22 Car. 2. Mosely v. Maynard.

4. Depositions taken in either cause, ordered to be used in both, which order was after publication in the first cause, wherein the proof was made; but before publication in the second cause. Chan. Cases, 236. Mich. 26 Car. 2. Norcliff v. Worsely.

5. Depositions taken in a former cause cannot be read in another cause against one that does not claim under the party against whom those depositions were taken; but Serjeant Phillips said, that it is a common case, that if a legatee bring a bill against the executor and proves assets, another legatee, though no party, may have the benefit of those depositions. Vern. R. 413. Mich. 1686. Coke v. Fountain.

Depositions taken in a cause, wherein only the father's name is put, and the party was not for life, shall not be read

against the issue in tail. Ch. Prec. 212. Ld. Peterburgh v. Duchess of Norfolk.

6. Creditors of L. obtain a decree for payment of their debts, and to set aside conveyances got by fraud, and Sir H. J. and the legatees are defendants. The legatees having a bill against Sir H. J. the question was, if the depositions in the former cause could be read in this; per Cur. the question being the same in both causes, and Sir H. J.'s defence the same, they ought to be read. 2 Vern. R. 447. Mich. 1703. Nevill v. Johnson.

(B) Depositions

(B) Depositions in Chancery read at Law; in what Cases.

1. **T**HOUGH a bill be *dismissed* yet the depositions taken on such bill are to be made use of here or at law, especially the bill not being dismissed on the point of right, but *for matter of form*. And it is usual and frequent to use depositions taken in one cause, if for the same matter that is in controversy in another, especially if against the same *defendant*, which was admitted by the counsel of the other side. Chan. Cases, 174, 575. Trin. 22 Car. 2. Arg.

2. But as to the using depositions in a cause dismissed, this difference was taken, that though where a cause is dismissed, the matter of it not being proper for equity to decree, yet the fact in this case proved may be used as evidence in that fact, between the same parties whenever it shall come in question again. Chan. Cases, 175. Arg.

3. Chan. Rep. 39. 40. S. C. that depositions taken on a dismissed bill of revivor brought by a purchaser were denied by the Court to be used on an original bill brought by him afterwards, for the bill of revivor being brought by a purchaser was void, and so the depositions were taken where there was no bill and answer depending, consequently no indictment of perjury could be brought against the witnesses.

3. But when a cause is dismissed not upon that ground but upon *irregularity*; as for that it comes by revivor, when it should come by original bill, so that in truth there never was regularly any such cause in court, and consequently *no proofs*, those proofs cannot be used; for proofs cannot be exemplified without bill and answer, nor can they be read at law, unless the bill on which they were taken, can be read. Arg. and so it was afterwards ruled about Mich. Term, 1669. by the Ld. Keeper. Chan. Cases, 175. in Case of Backhouse v. Middleton.

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(C) Depositions. Suppressed.

1. **I**F witnesses in Chancery *depote contradictorily or be false in parcel* they shall be rejected, and the party commanded to bring other witnesses. Br. Conscience, pl. 20. cites 16 E. 4. 9.

2. When depositions are published, yet new process may be examined and are called proofs obornants; but those are only *explanatory* of the first proofs; as if it was depoted that A. and B. did such a thing, and this is obscurely said without saying how he knows it, and this is published the deponent being dead; A. and B. may depote that they were present, &c. according to the first deposition, &c. But if they depote any thing *contrary*, and which alters any part of the matter, this deposition is void. Kelw. 96. a. pl. 4. M. 22 H. 7.

3. A. exhibited his bill against B. by *practice* of purpose to examine witnesses, and did examine witnesses accordingly, whereas the cause chiefly concerned W. R. and S. T. and therefore ordered

dered that the depositions shall be suppressed, and the said R. and T. shall exhibit a bill into this court, against all such as they think to be parties to the fraudulent abusing of this Court. Cary's Rep. 79, 80. cites 19 Eliz. Walford v. Walford.

4. Master examined one witness three times to the account; ordered that the depositions be suppressed. 2 Chan. Cases, 79. Mich. 33 Car. 2. Anon.

5. Depositions suppressed, because the Solicitor's clerk in the cause, did write as a clerk in the execution of the commission. 2 Chan. Rep. 393. 2 Jac. 2. Newte v. Foot.

(D) Depositions supplied or amended.

1. AFTER publication the Court would not amend a deposition mistaken. Toth. 140. cites 39 and 40 Eliz. Chamberlain v. Pope.

2. A man after examination supplies his deposition, *ad informandam conscientiam*. Toth. 140. cites 5 Car. Wynn v. —

3. A witness having committed a mistake in his examination before commissioners, applied to them to rectify it, but the commission being returned to London he went there, made oath of it, and that he was surprised by an hasty examination; but the commission not being opened, it was returned back to the commissioners with a special commission to open it, and permit the witness to rectify his mistake; the special commission being executed and returned, it was moved to suppress the depositions as unduly taken, and that no such special commission ought to have been, and they were suppressed. N. C. R. 92. 15 Car. 2. Randall v. Richards.

Chan. Cases, 25. 2 June 15 Car. 2. S.C. accordingly:— Upon hearing of the matter three witnesses examined by commission did in open court depose that the com-

missioners have set down their deposition, otherwise than they did depose; therefore it is ordered those depositions shall be void, and the same witnesses shall be examined again. Cary's Rep. 66. cites 2 Eliz. fol. 146. Peacock v. Collins.

4. The Lord Chancellor took notice of what dangerous consequence it would be, that if after publication passed, and people seeing where a cause pinched they should then be at liberty to look out witnesses to bolster up the faulty part of the cause, the necessary consequence would be perjury. Vern. 47. Pasch. 1682. In Case of Jones v. Purefoy. [556]

5. After a witness is fully examined, the examinations are read over to him and the witness is at liberty to alter or amend any thing; after which he signs them, and then, and not before, the examinations are compleat and good evidence. Wms's Rep. 415. Pasch. 1718. by the Reporter.

6. Therefore where a witness was examined, and before signing his examination died, the Master of the Rolls upon advising with a Master in Chancery then in court denied the making use of the depositions, as being not perfect. Wms's Rep. 414. Pasch. 1718. Copeland v. Stanton.

7. But where after an order for publication, defendant examined a witness and then perceiving the irregularity (it being after publication) the defendant on the usual affidavit by himself, his clerk in court, and solicitor, that they had not, nor would see any of the depositions, got an order to re-examine this witness; but before re-examination the witness died; upon affidavit of this, Ld. C. Parker ordered that the defendant might make use of the depositions, the re-examination of him being prevented by the act of God. Wms's Rep. 415. cites Mich. 1720 Debrox v. ———

8. On a petition to amend the deposition of a witness, who, being examined, swore only, that he was induced to believe, that he did not express himself in the manner the deposition was taken, and was positive he did not intend or mean to swear as the examiner had taken it, but really as in the amendment desired. Lord C. King said, that where it appears to the court, that either the examiner is mistaken in the taking, or the witness in making the deposition, he thought it was for the advancement of truth and justice to amend it, and the sooner the better, in regard of death or absence, and it would be unjust to pin a witness down to a mistake by denying to rectify it, and as to the amending it after publication, it could not be known before and ordered it to be amended, and the witness to swear it over again. 2 Wms's Rep. (646.) Mich. 1731. Griells v. Gausell.

For more of Depositions in general, see Evidence, Examination, Hearing, and other proper Titles.

Deputy.

(A) Who may make a Deputy.

*[557]

Mo. 846.
pl. 1141.
S. C. & S. P.
agreed and
resolved
that such
deputy by
the equity of the statute 7 Jac. cap. 5. may plead the general issue. ——— 3 Bulst. 77. S. C. and the whole Court agreed, that a constable might make a deputy, but no judgment given, the same being ended (as the Reporter says he heard) by agreement between the parties. ——— Roll. Rep. 274. pl. 49. S. C. & S. P. and the Justices inclined that the deputy of the constable is within the statute 7 Jac. cap. 5. to plead the general issue, because he comes in the right of the constable

[1. A CONSTABLE may make a deputy, and he may execute the warrants directed to the constable, and do other things belonging to the office of constable, though he is not sworn to * execute it well, as the constable himself is. M. 13 Jac. B. R. between Phelps v. Winscombe for this is not any judicial office.]

the equity of the statute 7 Jac. cap. 5. may plead the general issue. ——— 3 Bulst. 77. S. C. and the whole Court agreed, that a constable might make a deputy, but no judgment given, the same being ended (as the Reporter says he heard) by agreement between the parties. ——— Roll. Rep. 274. pl. 49. S. C. & S. P. and the Justices inclined that the deputy of the constable is within the statute 7 Jac. cap. 5. to plead the general issue, because he comes in the right of the constable

constable and represents his person.—3 Salk. 252. pl. 8. cites S. C.—As to the point of the constable's making a deputy, which was mentioned in Sir Walter Vane's Case, Sid. 355. pl. 5. Hill. 19 & 20 Car. 2. B. R. the Court were not agreed in it notwithstanding the Case of Phelos v. Winchcomb was cited.—Lev. 233. in Sir Walter Vane's Case, S. C. Twifden J. cited Hill. 9 Jac. Rot. 249. B. R. Phips v. Winchcombe, to be resolved that a constable cannot make a deputy; but the other Justices e contra.

2. In writ of false judgment it was assigned for error, that Justices came to the sheriff to hold plea of 1000l. and he held it before his under sheriff, and entered in the Roll that the plea was held before him, and therefore it seems that a *Judge cannot make a deputy*, but that an *officer may make a deputy*, as the sheriff, &c. may serve capias by bailiff or servant, contra in redisseisin, writ of enquiry of waste, &c. where he is Judge and officer, quære for it was not adjudged. Br. Deputy, pl. 19. cites 21 H. 6. 37.

3. Where *supplicavit comes to the sheriff to take surety of the peace of J. N. and if he refuses, then to send him to the next gaol*, there it is agreed by 4 justices that the sheriff cannot make a deputy to take the surety but shall do it himself; for of this he is judge but he may award a precept to another to arrest the party, for of this he is officer. Br. Deputy, pl. 20. cites 9 E. 4. 31.

4. So in redisseisin this shall be judged by the sheriff himself and the coroners; but to make execution, the sheriff may award precept to another. Note the diversity that minister or officer may make a deputy contra of Judge or Justice. Ibid.

5. It was said that a *judge or justice of record cannot make a deputy*; contrary of the sheriff who is an officer. Br. Judges, pl. 11. cites 9. 4. 31.

6. *Officer of trust cannot make a deputy unless the grant be [by these words] to exercise by himself or his sufficient deputy.* Br. Deputy, pl. 9. cites 11 E. 4. 1.

7. A *ministerial officer may make a deputy*, but he *ought to make returns in the name of the immediate officer.* Per Doderidge J. Roll. Rep. 274. in pl. 49. Mich. 13 Jac. B. R.

8. The *Justices in Eyre* could not make a deputy at common law; but now they may by statute, per Coke Ch. J. Ibid.

9. Sir W. V. having an estate in the manor of D. was chosen reeve to gather the lord's rents, he moved for a writ of privilege, as a *captain of the guards*, and so his personal service requisite in the court of the king, but the writ was denied, because they all (but Twifden) held that he *may make a deputy reeve.* Sid. 335. pl. 5. Hill. 19 and 20 Car. 2. B. R. Sir Walter Vane's Case.

10. A *deputy cannot make a deputy*; because it implies an assignment of his whole power, which he cannot assign over; but he may empower another to do a particular act. 1 Salk. 96. Pasch. 13 W. 3. B. R. per Holt Ch. J. in delivering the opinion of the Court in the Case of Parker and Kett.

11. *Tenant for life of the bailiwick of the Savoy* from the crown made a lease thereof for a year to an under-deputy and adjudged good; for by the statute 5 E. 6. cap. 16. all officers of fee are excepted, and so are all sub-grants and sub-demises thereof. 3 Salk. 252. pl. 7.

12. A *gaoler* may make a deputy; admitted. See 2 Ld. Raym. Rep. 1574. Mich. 4 Geo. 2. B. R. The King and Huggins.

For more of Deputy in general, see tit. *Officers, &c.* Letter (I) to Letter (M) *Prisbledge*, and other proper Titles.

Descent.

(A) Descent by the Custom of Gavelkind or Borough English.

Godb. 166. [1. IF the custom of a copyhold be, that the *eldest daughter* shall
pl. 232. have the land, the *eldest aunt* shall not have it by the custom,
Rapley v. for she is not within the custom. Pasch. 8 Jac. B. *Ratcliffe*
Chaplin, and *Chapman*, per Curiam.]
S. C.—
4 Le. 242.
pl. 395. S. C.

Godb. 166. [2. The *youngest brother* shall not have Borough English land,
pl. 232. for he is not within the custom. Pasch. 8. Ja. B.]
Rapley v.
Chaplin, S. P. where the custom was that the youngest son shall inherit. And Foster said, that so
it was adjudged in one Denton's Case.——4 Le. 242. pl. 395. S. C. and Foster J. said, that it
was so adjudged in one Totman's Case.——2 Roll. Rep. 366. Trin. 21 Jac. B. R. cites it as
adjudged in Chapman's Case. Pasch. 8 Jac. that if the middle son purchases lands in borough
english, and dies without issue, that the eldest brother shall have the land and not the youngest;
for the custom goes to the sons only and not to the brothers, and shall be taken strictly.——
Cro. J. 198. pl. 27. Mich. 5 Jac. B. R. Bailey v. Stephens, S. P.

S. C. cited [3. If a custom be, that if a man *dies without heir male*, that
by Holt his *eldest daughter* shall have the land, and if he hath no daughter,
Ch. J. that the *eldest sister* shall have the land, and if he hath not a sister,
Wms's Rep. the *eldest cousin*; but if he hath an heir male, that he shall have it
68. HiL. before any of them, and the tenant of the land hath several daugh-
1703. in tery, but no heir male, and the *eldest daughter* dies in the life of
delivering the opinion of the Court in the Case of Clement within the custom, and shall have the land by descent upon the
and Scudamore. And death of the grandfather. Mich. 10 Jac. B. 21. b. between God-
says, that *frey and Bullock*, per Curiam.]
by the common law the eldest daughter has not the preference before the rest, but all inherit
equally; yet custom may give the inheritance to the eldest daughter, and then her issue shall take
it in jure representationis; and this is as strong as a descent in borough english.

4. By custom when *one brother dies without issue* all the other brothers may inherit gavelkind lands. Co. Litt. 140. a. b. cites 23 Aff. 21.

5. There is a *special kind of borough english land; as it shall descend to the younger son if he be not of the half-blood, but if he be, then to the eldest.* Co. Litt. 140. b. cites 32 E. 3. Age. 81.

6. The father being seised in fee of borough english after the stat. of 27 H. 8. made a *feoffment in fee to the use of himself and the heirs males of his body according to the course of the common law*, and afterwards died seized, leaving issue two sons; it seemed to all the Board in Serjeant's Inn, that the youngest son shall have the lands by descent, by virtue of the custom, notwithstanding those words. Dyer, 179. b. pl. 45. Pasch. 2 Eliz. Anon.

7. Where a *feoffment* is made of *borough english* lands upon a condition to be performed, which was not done, the *heir at common law* shall take the advantage of the non-performance of such condition, but the youngest son shall be entitled to all actions in right of the land, as to a writ of error to reverse a judgment, by which the lands are affected, or attain, &c. Nelf. Ab. 396. pl. 2. cites Mich. 20 Eliz.

This is taken from Hughes's Abr. tit. Customs, 546. cap. 4. pl. 31. which cites it as adjudged.

8. The father having the *impropriate tithes arising out of the manor of W. which is borough english*, had two sons, the question was, which of the sons should have the tithes; adjudged that the eldest son shall have them, because tithes do *not arise naturally from the land*, but by the labour and industry of man; besides, of common right tithes are *not inheritances descendable to an heir*, but come in succession from one clergyman to another; it is true, by the *statute of dissolution* of monasteries they are made descendable to heirs, * but that being within time of memory the custom of borough english will not prevail in such case. Nelf. Ab. 397. pl. 6. Mich. 10 Jac.

This is taken from Hughes's Abr. tit. Customs, 546. cap. 4. pl. 30. cites it as the opinion of the Court. * This last part is not in Hughes.

9. If a man have issue two sons by several venters and having lands holden in socage in the nature of borough english dies, the younger brother being within the age of fourteen years, the elder brother of the half-blood shall not have the custody of the land, because by possibility the elder may inherit the land; for if the youngest dies without issue, and the land descend to an uncle, the elder brother of the half-blood may be heir unto him. Co. Litt. 88. b. (m).

10. If the *youngest son* makes his title to land in borough english he must *plead that time out of mind the custom* of the said manor has been, that when or at what time soever a *copyholder* dies seised of any copyhold lands in the same manor having divers sons, that the same has used *jura hæreditaria* to descend unto the younger son, &c. Calth. Reading, 44.

11. A. seised of gavelkind has three sons, B. C. and D. D. dies, leaving a daughter E. and then A. dies. E. shall inherit D's part. 2 Ld. Raym. Rep. 1025. Marg. says it was so ruled in an ejectment for lands in Kent. Mich. 8 Ann. Leonard v. the Earl of Suffex.

Fol. 624.

See tit. Ga-
velkind (B)
See tit. Heir
(F. 5.)

(B) [*Borough English.*]
To whom it shall descend.

Cro.C. 410.
pl. 6. S. C.
and the
Court was
divided ac-
cordingly.
—Jo. 361.
&c. S. C.
and the
Court was
divided and
so no judg-
ment. —
S. C. cited
by Holt
Ch. J.
Wms's Rep.
67. in Case
of Clement
& Scudam-
ore, Hill.
Ann. B.
R. & Ibid.
69. he said
that if
Jones's and
Crooke's
opinions
were to
prevail, it
could not
but occasion
uncertainty
and conse-
quently
confusion.
—S. C.
cited by
Holt Ch. J.
in deliver-
ing the opi-
nion of the
Court in
the said
Case of Cle-

ment and Scudmore. a Ld. Raym. Rep. 1026. — 1 Salk. 244. Holt Ch. J. inclined against the opinion of Croke in the Case of Reeve v. Malster. — 6 Mod. 122. Holt Ch. J. approved of the opinions of Berkley and Brampstone in this Case; for he said, if the other opinion had prevailed it would beget abundance of confusion, whereas following the other would settle things upon a lasting foundation.

[1. IF A. be seised of copyhold lands in fee of the nature of *borough english* land, and surrenders it into the hands of the lord, *ea intentione that he should re-grant it to him and his wife, and to the heirs of himself,* and the lord re-grants it accordingly, and there is a custom, that if any person be seised in fee of any such customary land, and dies so seised, that the land shall descend after his death *filio juniore hujusmodi tenentis customar' sic obientis seifiti secundum naturam of borough english land*; and after A. having issue three sons, dies so seised, and after, ten years after his death, the youngest son dies in the life of his wife without issue, it seems the eldest son shall have this land as heir to the youngest, and not the middle son, for the custom cannot extend to a collateral descent, scilicet, to direct the descent between brothers, for this is out of the custom, and the custom was once satisfied by the descent to the youngest, and the custom fixed the land in the youngest, and there is an end of the custom; and when the custom fails, the common law shall guide the descent; and by this special custom, this son, which was the youngest at the time of the death of his father, ought to have the land, and not any other who should come to be the younger after. Tr. 11 Car. B. R. between Reeve and Malster, it was argued by the Court, and Brampston and Barkly inclined, that the middle should have the land, and Jones and Croke e contra. But they all agreed, if this had not been customary land, that the eldest would have it as heir to the father, inasmuch as this was a reversion expectant upon an estate for life, and no actual seisin in the youngest; and they differed only in this, whether the custom should guide in the descent in the same manner as in the course of a descent at common law. And Croke and Jones held, that upon this special custom, if the copyholder died seised, having a son, and his wife enfeint of another son, who is born after, that he should not have the land; but Brampston and Berkly e contra. Intratur, Hill. 9 Car. Rot. 583.]

[2. If the custom be, that the youngest son shall inherit, and a man has issue two sons, and the eldest has issue two sons, and dies, and after the lands descend to the youngest son, who dies without issue, the eldest son of the eldest brother shall have the land, because the custom holds not in the transversal line, but only in the lineal descent. M. 24 & 25 El. at Hertford Term, resolved per Curiam, cited M. 10 Ja. B.]

3. A. seised in fee of land in borough english, makes a *feoffment to the use of himself, and the heirs males of his body, according to the course of the common law*; these words, according to the course of the common law, are void; for customs which go with the land, as this is * and gavelkind, and such like customs, which fix and order the descents of inheritances, can be altered only by parliament. By Catlin, Dyer, Sanders, Whiddam, Browne, and Bendlowes. Jenk. 220. pl. 70. D. 179. b. pl. 45. Pasch. 2 Eliz. S. C. & S. B. by all the Board at Serjeant's Inn.

4. Resolved, that where land in borough english descends to the youngest son, and he dies without issue, it shall not go to the younger brother without a special and particular custom. Cro. J. 198. pl. 27. Mich. 5 Jac. B. R. Bayly v. Stevens.

5. If the youngest son in borough english dies, the middle brother shall have the land by the custom. Per Williams J. 1 Bulst. 93. Mich. 8 Jac. in Case of Davis v. Hales.

6. In trespass done in lands within the dutchy of Cornwall, which were borough english where the custom was, that if there were an estate in fee in those lands, that they shall go to the younger son, according to the custom; but if in tail, they should descend to the heir at common law; and it was moved, that the custom was not good, because it cannot be at one time customary, and go according to the custom, and at another guildable. The whole Court (Crooke only being absent) held, that the custom was good. Mar. 54. pl. 82. Mich. 15 Car. Chapman v. Chapman.

7. Twisden J. denied the opinion of Lambert, that if the king purchases gavelkind lands, that it should go to all his sons; for Lambert had it out of Plowden, 247. a. from Southcote's opinion, and he from 35 H. 6. 28. a. and Mallet and Foster were of the same opinion. Raym. 77. Pasch. 15 Car. 2. B. R. in Case of Wiseman v. Cotton.

8. The copyhold lands of every tenant dying seised, were by the custom of the manor descendable to the youngest son, and a surrender was made to the use of B. and his heirs, who died before admittance; it was agreed, if B. had been admitted, the youngest son, after his death, should have inherited, but in regard B. died before admittance, the question was between the eldest and youngest son of B. who should have the land? and adjudged, that in this case, the eldest son should have the land, because of the strictness of the custom, and there never having been any seisin in the ancestor; but by my Report it would be otherwise, had it been alleged, that the lands were in the nature of borough english, which it was not, but only set forth as a particular custom; for the law takes notice of the custom of borough english, but not of this special custom; which is likewise the reason, why in pleading that lands are of the nature of borough english, you need not set forth the nature of the custom specially. Wms's Rep. 66. cited by Holt Ch. J. as about 15 & 16 Car. 2. C. B. Hale's Case. Ibid. The Reporter says that this seems to be the same case that is cited in 2 Keb. 158. 159. by the name of Pain v. Herbert.—S. C. cited accordingly. 2 Ld. Raym. Rep. 1025. 1026. —1 Salk. 243. S. C. cited by Holt Ch. J. as the Case of Pain v. Barr. Lev. 172. S. C. adjudged that the custom was good, and

9. In special verdict in ejectment in N. the case was, a copyholder in fee held of the manor of T. had issue two daughters, and died; that the custom of that manor was, that the eldest daughter

that the ad-
daughter
should have
the land
for her life
within the
custom,

[562]

*shall inherit the whole for her life, and after her death, the next heir male to the father, who can make a descent by males, shall have the lands to him and his heirs, and if there is no such heir male, then they shall escheat to the lord; after the death of this copyholder, his widow entered, having her widow's estate, and in her life the eldest daughter died, and then the widow died; and the question was, Whether the second daughter should have the land, or it should escheat to the lord? It was argued, that if such a custom had been annexed to lands in fee at common law, it had been void, because a fee simple can never escheat as long as there are heirs to inherit it; but this estate being created by custom, may be modified by custom, not only as to the enjoying, but to the extent of it; and though such a general custom shall not be good, yet in this case it may be good *ratione loci*, because this manor borders on Scotland, and the Scots in former times usually made invasions, and therefore it was safe for the lords there, to provide themselves of such tenants as might defend their possessions, viz. men and not women. After several arguments this was adjudged a good custom, and that the daughter was within this custom, for the eldest daughter in this case, shall not be only *primogenita filia*, but the eldest at the death of her mother, who derived her estate from her husband, by the custom. Sid. 267. pl. 18. Trin. 17 Car. 2. B. R. *Newton v. Shaftoe*.*

See tit.
Heir (G. 5.)
pl. 7. that
it was ad-
judged a
descendable
rechoild.

10. Land of the nature of borough english is *granted to A. and his heirs for three lives; A. dies*. The question was, whether the eldest son or the youngest son shall have it? and the Court all inclined that the youngest should have it, for he is in by descent. And he is not in as a person designed by description, for then an executor might have it; but that it is held, that if it be *granted to a man and his executors*, the executor shall not have it; and Hale said, the reason of that was, because the law will not suffer a freehold to run out of its channel. Adjournatur. Freem. Rep. 395. pl. 513. Trin. 1675. *Barksdale v. Dowdswell*.

11. The law takes notice of borough english and gavelkind customs. 6 Mod. 121. in *Case of Clement v. Scudamore*.

aLd. Raym.
Rep. 1084.
S. C. in 10-
tidem ver-
bis.—
1 Salk. 243.
pl. 4. S. C.
held accord-
ingly.—
6 Mod. 120.
S. C. ad-
judged for
the daugh-
ter.

12. One seised of a copyhold in fee in nature of *borough english*, has five sons, the youngest dies in the life of the father, leaving issue a daughter, and then the father dies; the youngest son's daughter is inheritable. Holt Ch. J. in delivering the opinion of the Court, said, that wherever this custom has obtained, the youngest son is there placed in the room of the eldest, who inherits by the common law; and there is no difference in the course of descents, but that the custom prefers the youngest son, and the common law the eldest; and therefore, as by the common law, the issue of the eldest son, female as well as male, *de jure representationis*, inherit before the other brothers, so by the same reason, when this custom has transferred the right of descent, from the eldest to the youngest son, it shall also by the like representation, carry it to the daughter of the youngest son; and there is no ground to make any difference betwixt a descent by this custom, and by the common law. Wms's Rep: 63, 64. Hill. 1703. *Clements v. Scudamore*.

13. A lease was made to a man and his heirs, during three lives, of lands in borough english, the youngest son should inherit that descendable freehold, though it were a new created estate; because the custom was so annexed to the land, as to effect that estate, cited by Holt Ch. J. 2 Ld. Raym. Rep. 1028. Hill. 2 Ann. as adjudged in B. R. in one Townsend's Case.

14. So if a rent be granted out of lands of the nature of gavelkind, or borough english, to a man and his heirs, it shall descend to the youngest, or all the sons; cited per Holt Ch. J. 2 Ld. Raym. Rep. 1028. Hill. 2 Ann. as adjudged in Townsend's Case.

15. If lands of the nature of borough english, or gavelkind, are settled to certain uses, as to all but the reversion in fee, but the reversion in fee is not settled, this reversion, as part of the old estate, shall descend in gavelkind, and borough english, as before; per Ld. Chancellor and the Judges assistants. 3 Wms's Rep. 62, 63. Trin. 1730. Obiter, in the Case of Chester v. Chester.

(B. 2) Ancient Manner of Descent.

[563]

1. BY the law used in England before, and at the time of the Conquest, all the descendants of a person dying intestate had preference not only in personal, but also in real estates; for if a man had died having three sons and a daughter, they all equally inherited his real estate; and this appears in Seld. Eadm. 184. Lamb. Saxon Law, 66, Siquis intestat' decesserit liberi ejus hæreditatem æqualiter dividunt. But after the Conquest, the kingdom and constitution were to be new modelled; and this alteration was made in the time of Henry 1. and then daughters were excluded if there were males, and it was by the 36th law of H. 1. See Lamb. 202, 203. and then the males did inherit all alike, especially all the common socage men. But even then if one had died without issue, and had a father or mother, the land should not go to any collateral, but to the father or mother; and this appears by the law of H. 1. Lamb. ubi supra. Siquis sine liberis decesserit pater aut mater in hæreditatem succedat vel frater aut soror, si pater & mater desit; so the collateral was not to come in but upon failure of father and mother. And where 1 Inst. 11. a. this is taken notice of as an exploded opinion; But Coke had not seen the laws of H. 1. then, and the Red Book in the Chequer, that he contradicts, is very ancient, and of great authority in law. 12 Mod. 623. Hill. 13 W. 3. B. R. in Case of Blackborough v. Davis.

2. But this law did not continue long, but was altered, between the reigns of H. 1. and H. 2. and the father and mother altogether excluded, and then the law came to be adjudged as it is to this day, that the land should not ascend to father or mother, but rather go to collaterals; and this appears by Glanvill, Lib. 7. 1, 2, 3, 4. C.—But this alteration was only as to real estates; and personal estates were left as they were. 12 Mod. 624. in Case of Blackborough v. Davis.

3. The

a New
Abr. 27.
S. P. in to-
tidem
verbia.

3. The *feudal succession* came in this manner; the lords gave lands unto such persons as behaved themselves well in the war, for their lives only; sometimes they also married their daughters to them. Then by their feudal donations, they limited the lands to go not only to the feudary himself, but also to the issue of that marriage; and this brought in the notion of succession among the northern nations that invaded the Roman empire. The lands therefore in the elder times went to the immediate descendants of such marriage, and originally to none else; and first they went to males, as the most worthy of blood, and most capable of doing the services annexed to such donations; for want of males it went to females, as descendants of the same marriage. The feud was united in the eldest male, because he was obliged to do the duty in the wars; and for every knight's fee, was to go out 40 days with his lord; so that the feud did not divide among the males because the duty could not be divided commodiously. Because 2dly, the males were to keep up the grandeur of the family, therefore the inheritance was not shared nor broken. Hence it came to pass, that among the males the eldest was preferred as the most worthy, since he was soonest able to go to the wars, and do the duties of the tenure. Gilb. Treat. of Ten. 9.

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(C) Bastard, Mulier.

[By what dying seised the Mulier shall be bound.]

Br. Entre
Congeable,
pl. 75. cites
S. C. —
Br. Bastardy
pl. 34. cites
S. C. that

some held that the seoffice of the bastard dying seised should bar the mulier, but Brooke says quare inde. — Fitzh. Bastardy, pl. 17. cites S. C. — Br. Discent, pl. 29. cites S. C. and says it seems that this is out of the maxim.

[1. IF a *bastard* enters after the death of the father, and continues seised for an year, and after aliens to another, and the alienee dies seised without any interruption, yet this dying seised of the alienee shall not bind the right of the mulier, for this is not within the maxim. 36 Aff. 2. adjudged.]

Br. Entre
Congeable,
pl. 31. cites
S. C. —
Br. Elloppel
pl. 74. cites
S. C. — Co. Litt. 244. a. S. P. — 8 Rep. 101. b. S. P. cites a E. 4. tit. Bastardy, 19. 21 E. 3. 34. b. 30 Aff. 7.

2. If a feme has issue a *daughter bastard* and another *daughter mulier* and dies, and both enter and make purparty, and the *bastard* dies seised of her purparty and her heir enters, the mulier cannot enter but has lost the land. Br. Descent, pl. 9. cites 21 E. 3. 34.

3. Affize. Bastard eigne and mulier puisne; the bastard entered, and the *mulier made continual claim*; the bastard died seised and his heir entered and the mulier entered, and the heir ousted him, and he brought affize; and so see that continual claim shall avoid the descent of the bastard. Br. Bastardy, pl. 13. cites 14 H. 4. 9. 10.

4. So elsewhere of *nonage* of the mulier. Br. Bastardy, pl. 13. cites S. C.

5. If

5. If a *bastard dies seised* and his *issue endows the wife of the bastard*, yet is not the entry of the mulier lawful upon the tenant in dower; for his right was barred by the descent. Co. Litt. 244. a.

8 Rep. 101.
b. S. P. and
says the
law is the
same, if the

feme of the father of the bastard eigne and mulier puisne be endowed yet the issue of the bastard shall have the reversion thereof for the reason abovementioned.

6. If a bastard eigne *enters into the lands and has issue and enters into religion*, this descent shall bar the right of the mulier. Co. Litt. 244. a.

7. If a man has issue such a bastard as is aforesaid and dies, and the bastard enters and dies seised, and the land descendeth to his issue, the *collateral heir of the father is bound*, as well as where there be two sons. Co. Litt. 244. a.

8. If a man had issue bastard eigne and mulier puisne and the *bastard in the life of the father has issue and dies*, and then the *father dies seised*, and the *son of the bastard enters as heir to his grandfather* and dies seised, this descent shall bind the mulier. Co. Litt. 244. b.

8 Rep. 101.
b. S. P.

9. If the *bastard dies seised without issue* and the *lord by escheat enters*, this dying seised shall not bar the mulier, because there is no descent. Co. Litt. 244. a.

10. And so it is to be understood albeit the mulier after the decease of the bastard does enter before the heir of the bastard, for the *descent binds and not the entry* of the heir. Co. Litt. 244. a.

11. If the bastard enter and the *mulier dies, his wife privement* [565] *ensient with a son, the bastard has issue and dies seised, the son is born*, his right is bound for ever. Co. Litt. 244. a.

8 Rep. 101.
b. S. P. for
inasmuch as

the father died in possession without interruption the mulier shall not allege against the issue bastardy in his father who is dead.

12. But if the *bastard dies seised, his wife ensient with a son, the mulier enters, the son is born*, the issue of the bastard is barred, for Littleton puts his case, that there must not only be a dying seised, but also a descent to his issue. Co. Litt. 244. a.

13. The descent of *services, rents, reversions expectant on estates tail, or for life*, whereupon rents are reserved, &c. shall bind the right of the mulier; but a descent of these shall not drive them, that have right, to an action. Co. Litt. 244. a.

8 Rep. 101.
a. b. S. P.
and cites 14
E. 2. tit.
Bastardy,
pl. 26. but

it shall not toll the entry or claim of the disseisee.——Co. Litt. 15. a. says it is clear, that if the father makes a gift in tail, or lease for life reserving a rent, and dies, and the bastard receives the rent and dies, this shall bar the mulier.

14. Bastards, or children born out of wedlock, were *totally excluded from all feudal succession though their parents had afterwards intermarried*, because the lords would not be served by any persons that had that stain on their legitimation, nor suffer such immoralities in their several clans, though the civil law admitted them as adopted by the subsequent marriage, and so the canon law, because the matrimony wiped off the precedent guilt. Gilb. Treat. of Ten. 17.

15. The *issue of the bastard eigne* not only gains a right of possession

possession but a right of propriety by the enjoyment of his ancestor. Such issue are held legitimated by the civil law, because they are adopted by the marriage of the mother; so by the canon law because, the matrimonium subsequens tollit reatum precedentem; but by the feudal law they were excluded, because such a stain was thought to continue from the crime of the parents, that they could not do the feudal service with honour to the feudal lords therefore they were anciently excluded, nisi nominatim ad feuda legitimatum. But by our law, if they had an uninterrupted enjoyment during life, the issue for ever inherited; for since there was no objection to their legitimation during their lives, the personal defect must die with their person, inasmuch as it were inhumanity to throw reproach on them after their decease; and having done the feudal duties without objection, the objection comes too late when then the personal dishonour ceases, and to the next person in possession no reproach can arise. Gilb. Treat. of Ten. 26. 27.

(D) *Who shall be bound by the Descent from the Bastard.*
Bastard and Mulier.

Br. Descent,
pl. 16. cites
S. C.

Fol. 625.

[566]

For it seems
that such
descent of
the bastard
is no bar,
but against
the mulier
and his
heirs, who

[1. IF tenant in tail hath issue bastard eigne and mulier puisne, and dies, and the bastard enters, and continues peaceably for his life, and dies, and this descends to his issue, this shall bind the mulier, though this be an estate tail. 39 E. 3. 38. b. admitted.]

[2. But it seems the issue of the mulier shall not be bound by such descent, for then (*) this should be a bar of the tail by the act of his father, which is against the statute.]

[3. If there be tenant in tail, the remainder over to another, and the tenant in tail dies, having issue bastard eigne and mulier puisne, and the bastard enters, and dies seised, having issue, the descent from the bastard shall not bind the right of him in remainder, but he shall have his action; for the continuance of the possession by the bastard shall not be prejudicial to him. 39 E. 3. 38. b.]

are privy by the maxim, and not to strangers. And it seems that such descent shall not bind the issue of the mulier, if he had issue, because of the tail, and this by the statute de donis conditionalibus in tail. Br. Descent, pl. 16. cites 39 E. 3. 38.

See (C) pl. 2. and the notes there. [4. If the bastard dies seised, the mulier being within age, it shall bind him. Contra, Brooke Descent, 29.]

Br. Descent, pl. 49. cites 5 E. 2. and Fitzh. 61. Verdict, pl. 48. where the best opinion is, that such dying seised shall not bind the mulier, but Norton contra, because the continuance makes the bastard heir; but Brooke says, quære inde ut hic. S. P. and so likewise if the mulier be beyond sea, or in prison, or non sanæ memoriæ. 8 Rep. 100. b. 101. a. says, that some hold the mulier barred for ever, but others hold the contrary; but the Reporter says, it seems to him, that the best opinion is, that the mulier is barred for ever; because continuance of possession and dying seised peaceably and descent to his issue makes him heir, and his issue shall inherit as heir, because he was legitimated by the law of holy church. The law prefers legitimation before the privilege of infancy. Co. Litt. 244. a. 8 Rep. 101. a. S. P. by the Reporter.

5. If *bastard eigne* and mulier puisne ate, and the *bastard* enters and makes a *feoffment* and dies, this is no bar to the mulier; for the maxim is taken strictly that he shall die seised. Br. Descent, pl. 41. cites 6 E. 2. and Fitzh. Bastardy, 24.

6. In assise A. is seised in fee, and has issue T. bastard eigne, and J. mulier puisne, and dies; T. the *bastard enters, and dies seised*, and has issue E. and the mulier has issue J. and dies; there if the descent be in the time of the mulier who was of full age (as in that case it seems he was) then the heir of the mulier has no remedy. Br. Descent, pl. 26. cites 31 Aff. 18. and 22.

7. Nevertheless it seems clear, that if the descent of the bastard to his heir had been in the time of the heir of the mulier, who was infant during his nonage, then clearly the entry of the heir of the mulier is lawful. Br. Descent, pl. 26.

S. P. if without interruption. Br. Entre Cong. pl. 68. cites 31 Aff. 18. & 22.

Br. Entre Congeable, pl. 68. S. P. cites 31 Aff. 18. & 22.— Br. Age, pl. 37. cites S. C.

8. If the *bastard enters* after the death of the father, and the mulier ousts him, and after the *bastard disseises the mulier*, and hath issue, and dieth seised, and the issue enters, then the mulier may have a writ of entry sur disseisin against the issue of the bastard, and shall recover the land, &c. And so you may see a diversity where such bastard continues the possession all his life without interruption, and where the mulier entreth and interrupts the possession of such bastard, &c. Lit. S. 401.

9. This descent differs from other descents; for this descent bars the right of the mulier, whereas other descents take away the entry only of him that right hath, and leaves him to his action; but here by the dying seised of the bastard, his issue is become lawful heir. Co. Litt. 244. a.

10. If a man has issue two daughters, the eldest being a bastard, and they enter and occupy peaceably as heirs; now the law in favour of legitimation, shall not adjudge the whole possession in the mulier (who then had the only right) but in both, so as if the bastard has issue and dies, her issue shall inherit. Co. Litt. 244. a.

8 Rep. 101. b. S. P. and says that with this, 17 E. 3. 59. Fitzh. Abridg-

ment, tit. Bastard, 32. — Co. Litt. 368. a. S. P. the sole possession shall not be adjudged in the mulier only because they both claim by one and the same title, and not one by one title, and the other by another title.

11. If a man has issue a son, being a *bastard eigne*, and a daughter, and the daughter is married, the father dies, the son enters and dies seised, this shall bar the feme covert. Co. Litt. 244. a. [567]

(D. 2) What shall be an Interruption of the Possession of Bastard Eigne.

1. IF the mulier interrupts the bastard's possession, or a stranger does it, and he agrees in the bastard's life (as when a stranger enters to avoid a fine, and within the five years he that has right assents) in this case the re-entry of bastard, and his dying seised, bars not the right of the mulier; but if the bastard recovers in assize

Litt. S. 401. Co. Litt. 245. a. — Glib. Treat. of Ten. 27. says that if the possession be once

interrupted by the mulier and the bastard re-enters, this only gets the possession, and by such descent the issue acquires only a jus possessionis.

As if it be by invitation to see his house and pictures, &c. or to dine with him, or to hawk, hunt, or sport with him, &c. Co. Litt. 245. b.

2. If the mulier comes on the land by consent of the bastard, he shall not avoid his possession thereby; but if he cuts down a tree, or does any other act which must be either a trespass or an entry, he thereby avoids the bastard's possession, for where an act may be done lawfully, the law will not adjudge it to be wrongful. Hawk. Co. Lit. 330.

Co. Litt. 245. b.

3. If the bastard enters, and the king seises for a supposed contempt, &c. of the bastard, and he dies, and his issue is restored on petition, the mulier is barred; for the possession of the king, when he has no good right to seise, shall be judged to be the possession of him in whose right he seised. But if after the father's death the mulier be found heir of knight service land, and within age, and the king seises, the bastard is foreclosed for ever; and if the king seises for a contempt of the ancestor, and the issue of the bastard be restored on his petition, for that the king seised without cause, the mulier is not barred. Hawk. Co. Lit. 330, 331.

(E) Heir. *What Things shall descend to the Heir or Executor.*

Godb. 199. 200. pl. 286. Garven v. Pym, S. C. but the principal case is not the S. P. but Cook Ch. J. in that case cites 9 E. 4. 14. the Dame

[1. IF a nobleman, knight, or esquire be buried in a church, and hath a coat of armour and penons, with his arms, and such other ensigns of honour as belong to his degree or order put in the church, or if a grave-stone or tomb be laid or made, &c. for a monument of him; in this case, though the freehold of the church be in the parson, and these are annexed to the freehold, yet the parson or any other cannot take them or deface them, but he is subject to an action to the heir and his heirs, in honour and memory * of whose ancestor they were put there. Mich. 10 Ja. B. Pym's Case, per Curiam. Co. Lit. 18. b.]

Wiche's Case, in which the S. P. was adjudged accordingly.——3 Inst. 202. cites Coven v. Pym, S. C. and Lady Wiche's Case.——Same cases cited per Cur. Cro. J. 367. Hill. 12 Jac. for the heir is inheritable to arms as to heir-looms, cites 30 E. 3. 2. 39 E. 3. 14.

*[568].

Godb. 200. pl. 286. S. P. cited by Coke Ch. J. to

[2. And the wife or executors that first erected them, may in the said case have an action against those that defaced them in their time. Co. Lit. 18. b.]

have been adjudged 9 E. 4. 14. in Dame Wiche's Case. And he said that he had seen a judgment in 6 E. 6. That if executors lay a grave-stone upon the testator in the church, or set up his coat armour in the church; if the parson or vicar removes them or carries them away, they or the heir may have the action on the case against the parson or vicar.——Mo. 878. pl. 1232. Pym v. Gorwyn, S. C. but not S. P. but Coke Ch. J. cited the Lady GRAY's Case, who put up the arms and helmet of her husband in the church at his funeral, and in trespass brought by her against the

the parson for pulling them down, the action was adjudged maintainable.——12 Rep. 104. in Corven's Case, S. C. Coke Ch. J. cited Dame Wiche's Case.——9 Infl. 202. cites S. C. of Corvin v. Pym, and Lady Wiche's Case.

[3. *In some places* the heir by the custom shall have the best chattle of his ancestor, by the name of an *heir-loom*. Co. Lit. 18. b.]

(E. 2) What shall be said a Descent by Relation, &c.

1. **W**HERE the *tenant by the curtesy surrenders to the heir*, and he is impleaded by writ of entry, his entry shall be supposed by his mother, and not by the tenant of the curtesy; for he is in by her, per Rolf, quod non negatur. Br. Enter en le, pl. 26. cites 1 H. 6. 1.

2. If *tenant in tail infeoffs his son and after disseises him* and the son enters, he shall be adjudged in by the feoffment and not by the descent, per Tremayle. Br. Discent, pl. 39. cites 18 E. 4. 25.

3. And if the *father and the son disseises J. N.* and after the son releases to the father all his right, and after the father dies, the son shall not be adjudged in by the descent but by disseisin, for he was party to the wrong. Per Brian Ch. J. Br. Discent, pl. 39. cites 18 E. 4. 25.

4. But if the *father disseises J. N. and after infeoffs his son, and after disseises the son and dies*, the son shall be adjudged in by descent. Per Brian. Br. Discent, pl. 39. cites 18 E. 4. 25.

5. *Disseisor, abator, or intrudor infeoffs A. who dies seised, and after his heir entered and infeoffed the disseisor, abator or intrudor*, he shall be adjudged in by the feoffment of the heir against all except the disseisor and those against whom he did the wrong; and against them he shall be adjudged in as abator, disseisor or intrudor, as he was at first, as he was party to the wrong, per Keeble. Br. Discent, pl. 33. cites 5 H. 7. 6.

6. If the *disseisor himself dies without heir and the lord enters by escheat*, the disseisee may enter; for there was no descent. Br. Discent, pl. 92. cites 9 H. 7. 24.

7. The wife after the death of her baron *waving jointure made after marriage*, has such relation and operation in the law, that now upon the matter the baron was ab initio sole seised, and by consequence the lands descended after his decease. 3 Rep. 28. 2. Mich. 33 and 34 Eliz. B. R. Butler v. Baker.

(F) What Persons may be Heir to another, and to [569] whom.

[1. **B**ASTARD brothers cannot be heir one to another. 43 E. 3. 32. b.]

2. If

2. If there be father and son, and the son makes lease for life and dies, and the reversion descends to the uncle and he dies, the reversion shall not descend to the father but shall escheat; because he must make himself heir to the son and not to the uncle who had the reversion cast upon him. Arg. Show. 246. in Case of Kellow and Rowden, cites 1 Inst. 11. 5 Ed. 4. 7.

3 Rep. 41.
b. 49. a. S. P.
for he, who
claims any
heredita-
ments in
possession
as heir,
ought to
make him-
self heir to him, who was last actually seized.

3. If a son purchases lands in fee-simple and dies without issue, living his father, the uncle shall have the land as heir to the son and not the father; for inheritance may lineally descend but not ascend. But if in such case the son dies without issue and the uncle enters and dies without issue living the father, the father shall have the land as heir to the uncle; because he comes to it by collateral descent and not by lineal ascent. Lit. S. 3.

4. Idiots, madmen, lepers, outlaws in debt, trespasses or the like, persons excommunicated, men attainted in a præmunire, or convicted of heresy may be heirs. Co. Litt. 8. b.

(F. 2) Who, by Way of Preference, shall take as Heir.

1. IF there is grandmother, mother and son, and the mother has a brother and the grandmother has a brother, and the son purchases and dies without issue, the grandmother's brother is heir. D. 314. pl. 95. Trin. 14 Eliz. Cleer v. Brook.—Pl. 444. 451. a. Pasch. 15 Eliz. S. C. and S. P. agreed by all the Justices.

2. If an advowson descends from the son to the uncle, the father shall not have it, if the uncle dies before he does or can present; so of a rent. Co. Litt. 11. b. ad finem.

3. It is an old and true maxim in law, that none shall inherit any lands as heir but only the blood of the first purchaser, for reuert a quo fuit perquisitum. Co. Litt. 12. a.

4. The next of the worthiest blood shall ever inherit as the male, and all descendants from him before the female; and the female of the part of father before the male or female of the part of the mother, because the female of the part of the father is of the worthiest blood; and so among the male, the eldest brother and his posterity shall inherit lands in fee simple as heir before any younger brother or any descending from him. Co. Litt. 14. a. in principio.

5. By the ancient custom of Wales females cannot inherit. 4 Inst. 241. cites a charter to that purpose.

3 Rep. 41.
Ratcliff's
Case, defici-
ente uno
non potest
esse hæres.

6. None can be heir to a fee simple by the common law but he that hath sanguinem duplicatum, the whole blood both of the father and the mother; and therefore the half blood is not inheritable by descent. Co. Litt. 14. a. 84. b.

7. Where

7. Where a man has several daughters and he devises land to a third daughter, remainder *proximo consanguineo* of the devisor the eldest daughter is the next. Palm: 303. Mich. 20 Jac. B. R. *Periam v. Pierce*.

8. If a son purchases and dies without issue, the father, grandfather, and great grandfather and so upward, all the male line are *ædæ* except brother or sister; but there is great grandmother and grandmother, and each of these have a brother, the grandmother's brother here shall inherit the son, because he is the next heir to the son on the father's part, but if the father purchases and dies without issue, the great grandmother's brother is then heir to him on his father's part; but if the father dies having a son and that son dies without issue, the lands here must go to the next heir of his father's part, and that is the son's great grandmother's brother, and the father's mother's brother is not to take, for the whole line is spent; for here is the same devolution and hereditary succession, as if the father had died without issue; but if the son enters, and is seized, the lands devolve upon the son's grandmother's brother (i. e.) the father's mother's brother. *Hales de Success.* 96. &c.

Hale's Hist. of the Com. Law, 241. &c. S. P.

(G) [Who may be Heir.]
By Matter subsequent.

[1. **A** BASTARD may be heir against a stranger by continuance. 43 E. 3. 32.]

cites 21 E. 3. 46. S. P.—A ballard may be heir by continuance of possession. *B. Parol Demur, &c. pl. 12. cites 21 E. 3. 46. Per Thorp.*—*Co. Litt. 8. 2. in principio, S. P.*—*See (C) pl. 1.*

2 Roll. Voucher (T) pl. 1.

[2. An *hermaphrodite*, that is as well male as female, shall be heir either as male or female, according to the sex which prevails. *Co. Lit. 8. [a. in principio.]*]

[3. If an alien be made a denizen, the issue which he hath after shall inherit him, but not the issue that he has before. *Co. Lit. 8. [a. in principio.]*]

[4. If an alien hath issue in England two sons, these sons are denizens, and yet the one of them cannot be heir to the other of them, because there never was any inheritable blood between the father and them, and where the sons could by no possibility be heir to the father, the one of them shall not be heir to the other. *Co. Lit. 8. [a. versus principium.]*]

See tit. Alien (F) per opt.

[5. If a man hath issue two sons, and after is attainted of treason or felony, the sons may be heirs one to the other, for the attainder of the father corrupts the lineal blood, but not the collateral blood between the brothers, which was vested in them before the attainder. *Mich. 40, 41 El. in Scaccario, Hobby's Case; quod vide, Co. Lit. 8.*]

4 Le. 5. pl. 21. S. C. according to Palm. 19. S. C. resolved; for though there is no

lawful blood between the sons and father, yet upon the rule put by Littleton, there is lawful blood of the part of the mother. *Noy. 158. to 171. The King v. Boreton and Adams, S. C. argued very fully but no judgment.*—*S. C. cited and affirmed by Doderidge and Haughton J. to have been resolved in the Exchequer.* *2 Roll. Rep. 93.*—*Cro. J. 539. pl. 7. S. C. cited as adjudged, that the daughter shall inherit.*—*Cro. C. 543. pl. 8. cites S. C.*—*S. C. cited Vol. VII.*

Litt. Rep. 48. as adjudged that he should not be heir to the brother, because the bridge was broken by the attainder of the father. — 2 Sid. 25, 27. cites S. C. — S. C. cited by Ld. Ch. B. Hale. Vent. 425. as ruled, that the sister should inherit her brother.

Sid. 201.
Pasch. 16
Car. 2. in
the Ex-
chequer
Chamber

* [6. *But if a man be attainted of treason or felony, and after hath issue two sons, in this case they cannot be heir one to the other, because they never could be heir to their father, nor ever had any inheritable blood in them.* Co. Lit. 8.]

in Case of Collingwood v. Pace, it was held contra, and says that so it appears in the Case of Boraston and Adams. Noy. 158, 159. and in the MS. and that for authorities there is only the single opinion of Ld. Coke, 1 Inst. 8. 2. in Hobbis's Case, which is against this judgment, and says, that this is confirmed by the Cases of Godfrey v. Dixon, in Cro. J. 539. and by Foster and Ramsey's Case, 3 Rep. 8. b. — See tit. Blood corrupted. (B)

Fol. 626.

[7. He that is *born deaf and dumb* may be heir to another. Co. Litt. 8. [*a. versus finem.*]]

[8. So he that is *born, deaf, dumb, and blind*, may be heir to another. Co. Lit. 8. [*a. versus finem.*]]

9. When the *tenements given in frankmarriage to one daughter are put in hotchpot between other parties*, they are become in the same course as other tenements, of which the common ancestor died seised. Br. Mortdancetor, pl. 24. cites 10 Aff. 14.

10. The *youngest son* entered after the death of his father, yet he cannot be heir by continuance of possession. Br. Parol demur, &c. pl. 12. cites 21 E. 3. 46. Per Thorp.

11. One was tenant by the curtesy and the heir within age, and *assise of rent* was brought against them, and the *tenant by the curtesy surrendered to the heir pending the writ, and died pending the writ*; and per June he shall not be adjudged in by descent as to the plaintiff to abate the writ, because the taking of the surrender is his own act, and if the tenant by his curtesy had charged, the heir should hold charged during his life. Per Rolf, if *writ of entry be brought against the heir after the surrender*, he shall be supposed in by his mother, and not by the tenant by the curtesy. Br. Surrender, pl. 24. cites 1 H. 6. 1.

12. If a man has issue *a son and a daughter*, the *son purchases* land in fee simple, and dies without issue, the daughter shall inherit the land; but if the father has *afterwards issue a son*, this son shall enter into the land as heir to his brother, and if he has issue a daughter and no son, she shall be coparcener with her sister. Co. Litt. 11. b. (s)

Lat. 72.
Pasch. 1
Car. B. R.
Gulielm's
Case; per
Jones, S.C.

13. If the *daughter consents to a ravisher*, and the *next heir enters and the daughter dies*, the heir is now in by descent; per Jones. Palm. 405, in a nota.

See tit.
Blood cor-
rupted.
And tit.
Alien.

All the
books cited
here seem
to be mis-
printed, for

(H) What shall be an *Impediment* of a Descent.

[1. **I**F a man hath *issue two sons*, and the *eldest is attainted of felony, and dies in the life of the father*, and after the father dies seised of lands, this shall descend to the second son, or to the daughters

daughters of the father, if he hath no son; for the attainder of the eldest son did not corrupt the blood between the blood between the youngest son and the father. 46 Aff. 1. Curia. Co. Litt. 8. dubitatur. 27 E. 3. 77. b.]

pl. a cited by Mr. Danvers.——But if the son attainted has a son at the death of the father the land should escheat. Br. Descnt, pl. 22. cites 27 Aff. 11.——D. 48. a. pl. 16. Mich. 32 H. 8. S. P. held accordingly in case the eldest son had no issue living, but if he had, the land should escheat and not go to the younger son, because such issue would be inheritable by the law had it not been for the attainder.——S. P. and same diversity by Berkley J. and Jones said, that when he was Judge in C. B. it was so adjudged in Mackwilliams's Case, and so also in B. R. in Case of Croker v. Kelsey and afterwards affirmed in a writ of error. Cro. C. 435. Jo. 34. Arg. cites 20 E. 2; Fitzh. tit. Descent [16] & D. 48. a.——Hob. 334. in a note at the end of Mackwilliams's Case cites D. 48. S. S. P.

*[572]

[2. But if the eldest son, being attainted of felony, survives the father, he shall be an impediment to his brother or next heir to have the land by descent from the father. 26 Aff. 1. [2.] adjudged, 1 H. 4. Rotulo Parliamenti, Numero 132. a petition was preferred, That where the eldest son, during the life of his father, is attainted, the next brother might notwithstanding succeed as heir to his father, &c. To which it was answered by the king, Let the common law run. Co. Litt. 8.]

then another heir of the father shall have it, who is next of kin to the son attainted, provided that he is not his son. Br. Descnt, pl. 22. cites 27 Aff. 11.——An attainted person cannot be an heir, nor have an heir, unless his blood be restored by act of parliament; neither can his children; if he has any, be heirs to any other ancestor. Co. Litt. 291. b.——3 Rep. 41. a. They cannot inherit either father or mother; for want of sanguinem duplicatum.——Hob. 334. in a note at the end of Fitzwilliams's Case cites D. 48. 32 H. 8. S. P.——Jo. 34 Arg. cites S. C. and Fitzh. Descnt [16] 20 E. 2. S. P.——Cro. C. 435. S. P. by Berkley and Jones J.

† See tit. Blood corrupted (B) pl. 2. and the notes there.

[3. If a man hath issue an eldest son, born out of the allegiance of the king, and after hath issue a younger son born in the realm, the youngest son shall be heir to the father, and the eldest shall not be any impediment to him, because the elder never had any inheritable blood in him. Co. Litt. 8.]

But see Lev. 60. Sid. 200, 201. Vent, 422. per Hale Ch. J. e contra;

4. Trespas of a close broken. Prisot intitled the defendant because the defendant was born ultra mare, and that he was seised of eight acres of land, where, &c. in fee, and in the time of H. 4. went beyond sea without licence of the king out of the allegiance of the king, and there espoused B. who had issue there the plaintiff, and there remained all their lives without licence, and died sole without any other issue of his body, and the land descended to W. as cousin and heir, and shewed how cousin, &c. who entered and enfeofed B. Que estate the defendant has, and gave colour to the plaintiff; judgment, &c. Newton said, if he who was born beyond sea survived his father, there he cannot be heir, nor any other of the blood of him who died seised; for there is a mesne impediment. Br. Descnt, pl. 12. cites 22 H. 6. 38.

5. A man has issue two sons, the eldest is attainted, &c. and dies; the father dies seised, the youngest son shall inherit, otherwise if the eldest had had any issue. Dy. 48. a. pl. 16. Trin. 32 H. 8. Anon.

6. There is a *diversity* between a *disability personal and temporary* and *disability absolute and perpetual*; as where one is *attainted of treason and felony*, this is an absolute and perpetual disability by corruption of blood for any of his posterity to claim any hereditament in fee simple, or as heir to him or to any other paramount him; but when one is *disabled by parliament (without any attainder) to claim the dignity for his life*, this is a personal disability for his life only, and his heir after his death may claim as heir to him or to any ancestors paramount him; resolved. 11 Rep. 1. b. 39 Eliz. in *Ld. Delaware's Case*.

7 If a man be *seised of lands in fee*, and has *issue two daughters*, and one of the daughters is *attainted of felony*, the father dies, both daughters being alive; the one moiety shall descend to the one daughter and the other moiety shall escheat. Co. Litt. 163. b.

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8. But if a man make a *lease for life*, the remainder to the right heirs of A. being dead, who has *issue two daughters*, whereof the one is *attainted of felony*; in this case some have said that the remainder is not good for a moiety, but void for the whole, for that both the daughters should have been (as Littleton says) but one heir. Co. Litt. 163. b.

9. If a son has a son who purchases lands, and the mother of the son is *attainted*, and he dies without issue, the uncle on the part of the father shall inherit, for he does not convey nor make a descent by the mother. Arg. Noy. 159. Trin. 4 Car. in the Exchequer in *Case of the King v. Boreston and Adams*.

10. So if the *issue of a bastard purchases lands* and dies without issue, although that land cannot descend to any heir on the part of the father, yet the heir of the part of the mother may; so if the bastard was *attainted*. For the heirs of the part of the mother makes not any conveyance by the bastard. Arg. Noy. 159. in the Exchequer in the *Case of the King v. Boreston and Adams*.

11. The husband and wife have several inheritances and they have *issue one son*, and die, this son supplieth the place of several heirs and makes his claim and descent to land severally, viz. to the lands of the father as son and heir to the father, and shall not intitle himself to that land as son to his mother, nor name his mother, and to the land of the mother as son and heir to the mother, and never mention the father; and yet it is true that the son, as he had a father, so had he a mother, and from them both does derive his blood and issue; yet will it not follow, that by the *attainder of the father the son shall be disabled to inherit the mother*; nor by the *attainder of the mother be disabled to inherit the father*; for the son claimeth not to be heir to both by the intire blood he receiveth from both, but severally to be heir to the father by the blood from the father, and heir to the mother by the blood of the mother. There is *sanguis naturalis* and *sanguis hereditarius*. The son as touching his natural blood has it proceeding both from the father and the mother, jointly, intirely and inseperably; but as touching his hereditary blood that is descended unto him, he has that dividedly and severally, viz. from his father for his inheritance, and from his mother for her inheritance; therefore the father's attainder

tainder which does not corrupt sanguinem, but jus sanguinis, is not the natural but the hereditary blood, may be an impediment that the son cannot be his heir because between them the hereditary blood is corrupted, but it can be no impediment to the son to inherit the mother's land, for that hereditary blood between the mother and the son is not corrupted by the attainder of the father. Arg. Noy. 168. in Case of the King v. Boreston and Adams.

12. If the father is attainted of felony in the life of the grandfather and afterwards the grandfather dies, the land shall escheat; for the son ought to make his descent by him, which cannot be; per Berkley, J. Cro. C. 435. Hill. 11 Car. B. R.

13. Without an actual entry of him in reversion upon the possession no descent can be cast; per Cur. held in evidence. 2 Keb. 139. pl. 74. Mich. 13 Car. 2. B. R. in Case of Burton v. Laffel.

(I) In what Cases a Man shall be said to be *in by* [574] *Descent, or by Purchase.*

[1. IF a man devises lands to one that is *his heir*, this is void, and it shall operate by descent. Hobert's Reports, 42. b. Counten's Case, for where there is not any alteration of the estate by the devise of the estate which the law gives to him, he shall be in by descent, which by intendment is more for his advantage, as to take away an entry, and for a warranty, and is the more ancient title.]

Hob. 30. S. P. per Hobart. C. 1. cites 4 H. 6. — Vaugh 271. S. P. by Vaughan Ch. J. and cites Cro. E. 833. pl. 2. Trin. 41 [43] Eliz. Hainsworth v. Pretty.

[2. If a man devises lands to his wife for life, the remainder to J. S. who is his next heir in fee, this is a void devise to J. S. and he shall be in after the death of the devisor by descent, for the alteration of the estate in reversion, which the law gives him, to a remainder, which is given by the devise, is not any alteration of the estate in point of estate, and therefore he shall be said to be in by descent, which is the more ancient and better estate, and not by purchase by way of remainder. Mich. 24 Car. B. R. between Preston and Holmes, adjudged upon a special verdict. Intratur. Tr. 23 Car. Rot. 252.]

[3. If a man devises lands held by knight's service to his wife till J. S. who is his next heir, comes to the age of 24 years, and at that age he devises all to the said J. S. in fee, and when he comes to the said age of 24 years, that his wife shall have the third part for her life, and if J. S. dies before the age of 24 years, then the land shall remain to the wife during her life, and after her decease, (if J. S. have no issue) the remainder to his daughter in tail, the remainder to the right heirs of the devisor; the wife dies after the heir comes to the age of 24 years; in this case no intail is made by the will, but J. S. shall have it by descent in fee. D. 2. 3. Ma. 124. 38. adjudged.]

2 Le. 11. pl. 16. Hill. 20 Eliz. C. B. Hinde v. Lyon, S. P. held accordingly, and seems to be S. C. notwithstanding the difference of the years. — 3 Le. 64. pl. 96. S. C. in totidem verba. — Ibid. 70. pl. 107. S. C. in totidem verba. — S. C. cited by Hobert Ch. J. Hob. 30. — S. C. cited a Roll. Rep. 217. Arg.

Sty. 249.
Bawly v.
Lowdall,

* Fol. 627.

S. C. adjor-
natur.

Ibid. 273.

S. C. and

the former

judgment

in C. B. re-

versed. See

tit. Parole

(H) pl. 4.

S. C. and the

notes there.

[575]

[4. If *A.* be seised of a copyhold in fee, and surrenders it to the use of his will, and after by his will devises it to *B.* his cousin, for his life, and after his decease to the heirs of his body begotten for ever. (*) In this case the word *heir* being limited to the body of *B.* est nomen collectivum, and all one with the word heirs; and the words for ever, in case of a devise, makes a fee, and is only put to shew his intention, as is usual when land is given to another and his heirs for ever; and therefore in this case this is a fee executed in *B.* and his heir is in by descent, and not by purchase; and it is not like to Archer's Case, Co. 1. where the devise is to one for life, and after to his heirs male, and to the heirs male of such heir male, for there the inheritance is limited to the heir of the body of the heir male, p. 1651. adjudged in a writ of error upon a judgment in Banco, upon a special verdict between Pawly and Lowdall, and the judgment given in Banco; e contra reversed for this error, intratur, p. 1650. Rot. 279. this reversed by the opinion of the Court, præter Justice Jermyn, who was of the contrary opinion.]

[5. If a man leases to one for life, the remainder to the right heirs of *J. S.* *J. S.* being dead at the time, his right heirs hath the remainder by purchase. 27 E. 3. 87.]

See tit. Heir
(G) pl. 13.

[6. So the right heir shall have the remainder by purchase, though *J. S.* was living at the time of the grant. 27 E. 3. 87.]

* Br. Dif-

cent, pl. 6.

cites S. C.

Br. Estates,

pl. 6. cites

S. C.

† Br. Estates,

pl. 7. cites

S. C.

Br. Nuper obiit,

pl. 1. cites

S. C. so that the heir is in by remainder and not by purchase; and Brooke says. Sic vide, that it is a fee simple executed.

¶ Fitz. Mordantessor,

pl. 4. cites

S. C.

See tit. Remainder (G) pl. 7. & (H) pl. 3. 4. and the notes there,

[7. When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited immediately to his heirs in fee or in tail, there the words, his heirs, are words of limitation, and not of purchase, for his heir shall be in by descent. Co. 1. Shelly, 104. * 40 E. 3. 9. b. † 45 E. 3. 19. 17 E. 3. 43. b. 64. Contra, ¶ 7 H. 4. 23. b.]

* Br. Dif-

cent, pl. 6.

cites 40 E.

39 S. C.

† Br. Dower,

pl. 23. cites

11 H. 4. 73. but nothing is said to this point directly. — Fitzh. Dower, pl. 27. cites S. C.

¶ Fitzh. Age, pl. 105. cites S. C.

[8. So it will be if an estate in fee or in tail to his right heirs be limited immediately. Co. 1. Shelly, 104. * 40 E. 3. 10. adjudged. † 11 H. 4. 74. ¶ 24 E. 3. 36. 27 E. 3. 87. b.]

[9. If a copyholder of inheritance surrenders it to the use of another and his heirs, and he to whom the surrender was made dies before admittance, and after the lord admits his heir, he shall be said in by purchase, and not by descent, for he is in by the lord, for nothing was in his father by the surrender before admittance. Tr. 40 El. B. Moore's Case.]

Hob. 136.

pl. 185.

Pasch. 15

Jac. S. C.

Cro. J. 408.

pl. 5. S. C.

held ac-

cordingly.

[10. If *A.* bargains and sells land to *B.* in fee for money, and after dies before enrolment of the deed, and after the deed is enrolled, his heir shall be in by descent; and if it be held in capite, shall sue livery if he be of full age, and shall be in ward if within age, for upon the enrolment it settles in the bargainee, between the bargainor and him.]

him, *ab initio* by the statute of uses; and the statute of inrolments says, That nothing shall pass except it be inrolled, so that if it be inrolled it vests not by the statute of inrolments, but by the statute of uses. Hobert's Reports, 184. Dimmock's Case.]

11. Where land is given in tail, the remainder to the right heirs of the donee, and he dies without issue, his heir collateral shall be adjudged in by descent from his ancestor, and not by purchase from the donor. Thel. Dig. 177. Lib. 11. cap. 54. S. 54. cites Hill: 30 E. 3. Entry, 58.

12. And so it shall be where lease is made to one for his life, the remainder to his right heirs. Thel. Dig. 177. Lib. 11. cap. 54. S. 54. cites 45 E. 3. 19. and 33 H. 6. 5.

13. Where land is given to the father for life, the remainder to the eldest son in tail, the remainder to the right heirs of the father, and the father died, and after the son died without issue, and the youngest son entered, and was adjudged to pay relief, as heir to his eldest brother, and not to be purchaser by name of right heir of the father. Br. Estoppel, pl. 25. cites 40 E. 3. 9.

14. In assise, a man leased to the baron and feme for life, remainder to A. in tail, A. by deed released to the baron and feme all his right without warranty, and after died, his issue within age; the baron aliened to B. in tail, remainder to C. in fee, and after B. died without issue, and then the heir of A. entered upon C. and C. ousted him, and A. brought assise and recovered; for his entry was lawful, because by the release without warranty, nothing passed but his own estate for his life who leased, and the entry is good upon the feme covert, and she is put to her cui in vita. Quod nota. Br. Entre congeable, pl. 83. cites 43 Ass. 17.

15. If the son disseises J. N. to the use of his father, and J. brings assise against the father and son, and the father dies pending the writ, the writ shall abate, for the writ is in by descent. Br. Descent, pl. 17. cites 1 H. 6. 1.

16. Land is given to W. and A. his feme, in special tail, the remainder to R. in tail, the remainder to the right heirs of R. the baron died without issue, and A. his feme survived, and is tenant in tail after possibility of issue extinct, and took another baron and had issue, and after R. died without issue, to whom A. the feme is heir, and after A. died, the second baron shall be tenant by the curtesy, for when the remainder in fee came to the feme tenant in tail, after possibility of issue, the franktenement was extinct in the fee, and so A. was seised in fee, but per Pigot, if A. was within age, she shall not have her age, nor she shall not be in ward, for she had the possession by purchase; per Pigot and Choke; and per Needham, if he in the reversion or remainder had charged the said A. should hold discharged. Br. Estates, pl. 25. cites 9 E. 4. 17, 18.

17. If the heir within age recovers by writ of entry *sur disseisin*, he shall be in ward; for he is as if his ancestor had died seised, and he is in by descent, and the same law if the heir within age recovers by writ of coignage. Br. Garde, pl. 42. cites 15 E. 4. 10. Per Browne.

18. If a man gives in tail the remainder to his right heirs, the fee simple never was out of him, and therefore it descends to his heir. Br. Livery, pl. 61. cites 32 H. 8.

19. But otherwise it seems where a man makes a feoffment in fee in possession, and dismisses himself of all, and re-takes for life the remainder in tail, the remainder to his right heirs and dies, and after the tenant in tail dies without issue, there the heir who is right heir, is purchaser. Ibid.

20. But if the tenant in tail had died without issue, in the life of the tenant for life, and after the tenant for life dies, there the fee simple was vested in the tenant for life, by extinguishment of the mesne remainder, and therefore there the fee simple descends. Ibid.

21. If baron makes feoffment in fee, to the use of himself and feme in tail, (within the 11 H. 7. cap. 10. ex prout viri) remainder to the heirs of the husband; they have issue a daughter, the baron dies; the wife privement enseint with a son; the feme before the birth of the son levies a fine, or suffers a common recovery; in this case, though the daughter do or do not enter, or though the daughter had joined in the fine, or had been vouched in the common recovery, or by any other act had disabled herself to take advantage of the act, yet the son born afterwards shall take advantage of it, for the daughter cannot do any act to bar the son of his entry; but upon the 6 R. 2. cap. 6. which enacts quod proximus de sanguine eorundem rapientium, et raptorum cui hereditas descendere, &c. deberet post mortem rapientis vel raptæ habeat titulum, &c. intrandi, &c. Here if the daughter enters, she shall retain it always against the son born afterwards, for the daughter by this statute has the land merely as a purchaser in fee simple; for the statute says, intrabit, &c. et tenebit de jure hæreditario. 3 Rep. 61. b. Mich. 37 & 38 H. 8. in a nota by the Reporter.

[577] 22. And compare it to the case, where if a remainder is limited to the right heirs of J. S. and he dies, having a daughter, the daughter shall have this as a purchaser, and shall retain the land against the son born afterwards, but when the daughter enters by 11 H. 7. she is in of an estate tail per formam doni and so in nature of a descent, and not merely as a purchaser, for she is to claim as if the wife had been dead. 3 Rep. 61. b. 62. a. in a nota by the reporter, cites 9 H. 7. 25. b.

23. If a man leases for life, the remainder over in fee, and he in remainder dies, his heir within age; his heir shall not be in ward, and contra if the tenant for life, who was tenant to the lord, dies; for there the heir has the remainder and land by descent. Quod vide in the writ of ejectment of ward, in Old Nat. Brev. Br. Garde, pl. 113.

in ward in the life of the tenant for life; for he in reversion is immediate tenant. Contra of him in remainder living the tenant for life. Br. Garde. pl. 113. cites Old Nat. Brev.

24. If a man seised of the manor of S. covenants with another, that when J. S. shall infeoff him of the manor of D. then he will stand seised of the manor of S. to the use of the covenantee and his heir,

heir, the covenantee dies, the heir within age, J. S. enfeoffed the covenantor; and here it was holden in Wood's Case. (3 Eliz.) that the heir shall be adjudged to be in, in course and nature of a descent, and yet there was no right title, action or use which descended, but only a possibility of an use, which cannot be released or discharged, but this might, if the condition had been performed, have vested in the ancestor, then the heir must have claimed by descent, and therefore the heir in this case was not in by purchase, but by course of descent. 1 Rep. 98. b. 99. a. in Shelly's Case, cites Pl. C. 284. a. Chapman's Case.

25. The father made a *feoffment to A. for life*, the remainder *unto the heirs males of the body of the feoffor*, the remainder to his own heirs in fee. The father had two sons, and the elder had a daughter and died, and it was adjudged for the daughter against the uncle, either because the entail to the heirs males was void, or because it ceased in the elder son. Hob. 30. cites D. 156. Mich. 4 & 5 P. & M. Grefswold's Case.

limitation of this remainder in tail void; because the donor cannot make his own right heir a purchaser without departing from the whole fee simple out of himself, and for the one cause or the other the Justices were against the tail and with the heir in general, and adjudged accordingly.—Mod. 238. S. C. cited per North, Windham and Atkins, who agreed that *at common-law*, a man could not make his right heir a purchaser without parting with the whole fee, but that *by way of use* he might; that Grefswold's Case in Dyer is of an estate executed.—S. C. cited 2 Mod. 209. Arg. and Ibid. 211. per Cur. Patch. 29 Car. 2. C. B. and they held the opinions of Dyer and Saunders there to be good law.

And. 3. pl. 4. Grefswold's Case, S. C. —D. 156. a. b. pl. 24. 25. S. C. and Saunders, Ch. J. and Dyer thought the

26. E. S. had issue H. and R. H. dies, having issue M. a daughter, and leaving his wife *privement enfeint* with a son; E. S. being tenant in tail, suffers a common recovery to the use of himself for life, and after, to the use of the heirs males of the body of E. S. lawfully begotten, remainder over; E. S. dies the very day the common recovery passes, and execution is issued after his death; R. the uncle enters. A son is born to H. deceased, and he enters; adjudged lawful, for the uncle did not enter as a purchaser; for if the father had lived, he would have had the estate, and not the uncle; adjudged by the Ld. Chancellor Bromley, and all the Judges except one of C. B. 1 Rep. 93. b. to 107. Trin. 23 Eliz. Shelly's Case.

Mo. 136. pl. 281. S. C. the Justices were all agreed that R. was in by descent and not by purchase after the death of E. and before the birth of H. the defendant; and adjudged quod

querens nihil capiat per Breve.—And. 69. pl. 143. S. C. adjudged.—D. 373. b. 374. a. pl. 15. S. C. resolved by the Justices of both Benches and the Chief Baron, that the posthumous son shall have the land as next and eldest heir male.—Jenk. 249. pl. 40. S. C.

27. An *use* is limited to the use of *himself for life*, remainder to the use of his heirs, and the heirs females of the body of the said heirs; the heir here takes by purchase; for then the words subsequent, viz. "And of their heirs females of their body," shall be void; per Anderson. 1 Rep. 95. b. Trin. 23 Eliz. in Shelly's Case. [578]

28. Where the heir is to take any thing which might have vested in his ancestor, the heir shall be in by descent; so that although an estate or right do first vest in the heir, and not all in the ancestor, yet

yet the heir shall take this in the nature and course of descent. 1 Rep. 98. a. Trin. 23 Eliz. in Shelly's Case.

29. When an estate for years is limited to the ancestor, the remainder to another for life, the remainder to the right heirs of the lessee for years; the heirs here are purchasers. 1 Rep. 104. a. Trin. 23 Eliz. in Shelley's Case.

In Archer's Case,
1 Rep. 66.

Mich. 39 & 40 Eliz. agreed that the heir shall be a purchaser.

30. So if the remainder be limited to the heir in the singular number, upon a lease for life. 1 Rep. 104. a. in Shelley's Case.

Cro.E. 313.
pl. 5. S. C.
the daughter
married
and had
issue; Gaw-
dy and Fen-
ner held
that R. had
only an
estate for

life, and that her heir shall take as a purchaser, but Popham held e contra, et adjournatur. — Ow. 148. Lilly v. Taylor, S. C. and Gawdy and Fenner held it, an estate for life only in R. and that the issue was a purchaser; but Popham and Clench held e contra. — See tit. Remainder (G) pl. 7. in the notes where this case is fully and truly stated by the Ld. Ch. J. Raymond.

31. M. devised lands to R. his daughter, for life, and if she marry after my death, and has issue of her body lawfully begotten, then I will, that her heir after my daughter's death shall have the lands, and to the heirs of their bodies begotten, the remainder to a stranger; adjudged, that she had not estate tail, but for life only, and the inheritance in her heir by purchase, it resting in abeyance all his life, and settling in the infant of her death. Mo. 593. pl. 803. Hill. 35 Eliz. Clerk v. Day.

32. Devise to trustees to the use of the heir, for so long a time as he and his heirs should suffer B. to enjoy, &c. the son doth not take by descent but purchase. Mo. 727. pl. 1013. Pasch. 36 Eliz. in the Court of Wards. Digby's Case.

33. If lands be given to A. and B. so long as they jointly live together, the remainder to the right heirs of him that dies first. A. dies, his heir is now in by descent. Co. Litt. 378. b. in principio.

34. In the case of an exchange, if one of the exchangers enters and dies and the heir of the other enters, after his father's death he hath it by descent although his father has nothing in it. Jenk. 249. pl. 40.

35. So of covenant upon a consideration and a condition precedent to raise an use to A. and his heirs, and A. dies before the performance of it, and the condition is performed afterwards; yet the heir of A. shall take by descent. Jenk. 249. pl. 40.

36. So of a condition broken in the life-time of the father, or after his death and the heir enters for the condition broken; the heir is in by descent. Jenk. 249. pl. 40.

37. So of a fine surrender to the conusee and his heirs, and the conusee dies before entry, his heirs shall have it by descent. Jenk. 294. pl. 40.

*[579]
The Case
of PYBUS
v. MIL-
FORD, was
denied to be
law in the
Case of
SOUTH-
COTT v.

38. A man having issue by one venter R. and S. by a second venter, covenants to stand seised to the use of his heirs male begotten or to be begotten on the body of Jane his second wife, and died; S. is here in by descent; but if S. did not take by descent, yet this was a contingent use in him by purchase; for the limitation to the heirs of the body J. will make a special heir to serve the turn, and per Hale and Wild, * the heirs of the body of the second wife is a good

good name of purchase. 1 Vent. 372. 381. Trin. 26 Car. 2. *Stowell*,
B. R. Pibus v. Milford. 2 Mod. 211.
Pasch. 29

Car. 2. C. B.—a Vern. R. 735. S. C. cited per Cowper C. and holds with Hale Ch. J. that the implication was needless, and that Mitford took by purchase and description; and that Wylde, as convinced, by his argument declared he was of the same opinion; so that the opinion of Hale and Wylde may outweigh by way of authority the opinion of Cook obiter in Shelly's Case, and that of Hobart in Case of Counden v. Clarke, their opinions not being upon the point adjudged.

39. A man cannot either by conveyance at the common law or by limitation of use, or by devise make his right heir a purchaser, *Whensoever the ancestor takes an estate for life, and after a limitation is made to his right heirs, the right heir shall not be purchaser.* Vent. 372. Trin. 26 Car. 2. B. R. agreed by Wylde, J. in the Case of Pybus v. Mitford. Co. Litt. 32. b.

40. The rule, that where a man takes frank-tenement and the estate is after limited to his heirs that they shall take by descent, fails in divers cases; as if lands are given to A. for life, remainder to B. for life, and if A. dies before B. then to the right heirs of A. In this case the heirs shall take by purchase. Arg. Litt. Rep. 258. Pasch. 5 Car. C. B.

41. So lease to A. and B. and if A. dies, living B. the remainder to the heirs of A. The reason seems to be, because there is no possibility that the frank-tenement and the fee shall be conjoined in A. during his life. Arg. Litt. Rep. 258. Pasch. 5 Car. C. B.

42. But if lease be to A. and B. for their lives, and if J. S. dies during their lives * there the right heirs of A. shall take by descent, because there is a possibility that J. S. may die during their lives. Arg. Litt. Rep. 258. Pasch. 5 Car. C. B. * These words seem to be wanting, viz. "Then the right heirs of A."

43. An use of a term to the husband and wife, and after to their issue, they then having none, is all one as limited to them and the heirs of their bodies; the issue takes nothing as a purchaser. Per Lord Keeper. Chan. Cases, 266. Mich. 27 Car. 2. Bullock v. Knight.

44. Though at common law a man could not be donor and donee without he part with the whole estate; yet it is otherwise on a covenant to stand seised to uses; resolved. 2 Mod. 211. Pasch. 29 Car. 2. C. B. Southcott v. Stowell.

45. Where the heir takes by a devise with a charge, as paying 20*l.* &c. he does not take by descent but by purchase. Per North, Ch. J. and Atkins. 2 Mod. 286. Hill. 29 and 30 Car. 2. C. B. Brittan v. Charnock. Rep. 248. pl. 283. S. C. the Court seemed to take this

rule that wheresoever the heir has his election to one way or the other, and that he comes to the estate both ways alike, there the law for the benefit of creditors, adjudges him in by descent, rather than by purchase and devise; but here, unless the devise be void, he cannot take but upon the payment of 20*l.*—But where the same estate is devised to A. which he would have taken by descent, he is in by descent notwithstanding the possibility of a charge. 1 Salk. 241. pl. 2. Hill. 10 & 11 W. 3. C. B. Clerk v. Smith.—And Ibid. Treby, Ch. J. and Powell, J. denied Gilpin's Case, Cro. C. 161.

46. In debt upon bond brought against the defendant as heir to his father, and *riens per descent* pleaded, the plaintiff replied *assets*, and

and issue thereupon; and the evidence was, that the obligor, the defendant's father, *devise*d to the defendant his son and heir certain messuages in Exchequer Alley in fee, but chargeable with an annuity or rent-charge payable to the defendant's mother; and it was held by Holt Ch. J. that these messuages descended to the defendant and were affets; for (by him) *the difference is*, where devise makes an alteration of the limitation of the estate, from that which the law would make by descent; and where the devise conveys the same estate, as the law would make by descent, but charges it with incumbrances. In the former case the heir takes by purchase, in the latter by descent. *Ld. Raym. Rep. 728. cites Trin. 13 W. 3. B. R. Guildhall, London; Emerson v Inchbird.*

[580] 47. *Heirs or heir male* cannot be a name of purchase, but *heirs males of his body* may; therefore if there is no such thing in propriety of speech as an heir male, without saying of whose body, for that reason heir male of his body, or heirs males of itself, where the law will supply these words, of his body, as it will in a *devise*, may be a good name of purchase; but yet the party who would take by such a limitation must be such a person as may be an heir by the common law, and would take by that name. 3 Salk. 336, 337. pl. 2. Mich. 7 Ann. Lord Ossulston's Case.

48. The distinction between taking by descent and taking by purchase, *where the words are the same*, though it be mentioned in books of good authority yet it seems to have no sufficient foundation of reason or authority of law to support it, and if it should prevail, in all cases would overthrow another rule as certain, viz. that a man may take by purchase if he be sufficiently described, though without addition of Christian or surname, nay, though his Christian name be false or mistaken, as appears by several cases put in Co. Litt. 3. a. per Lord Cowper. Ch. Prec. 463. Hill. 1716. in Case of Brown v. Barkham.

49. If a *feoffment* is made to several uses, the reversion in fee to the heirs of the feoffor, in such case the heir shall take the reversion by descent, because it was part of the old estate of the feoffor; for so much of the use of the lands as he did not dispose of by the feoffment still remained in him as part of the old estate. 8 Mod. 23. Mich. 7 Geo. in Case of Smith v. Trigg.

See tit. Co-
pyhold.
(C. e)

(K) In what Cases it shall descend to the Half Blood.

What shall be a Seisin to take away the Descent.

[1. IF J. hath issue two daughters by several venters, and dies seized of socage lands, and the lord seises the land to know who shall be his tenant, and for the safety of his rent, and leases it for seven years for the sustenance of the daughters of J. saving his rent; this shall not make such a seisin in the eldest, but that after her death the second daughter shall have the land. 34 Aff. 10. adjudged.]

2. So

[2. So if the *eldest daughter* being an infant, releases to the abator after the death of her father, this does not make such a feisin in him, but that it shall descend to the youngest daughter. 34 Aff. 10. adjudged.]

Br. Discent,
pl. 27. cites
S. C. —
Br. Mort-
danceslor.

[3. But if the *eldest daughter* being an infant, enters upon the abator, and makes a feoffment, this shall bar the youngest of the half blood, for this entry made a feisin in him. 34 Aff. 10.]

Fol. 628.

pl. 43. cites
S. C. that

one had issue two daughters by diverse venters, and died seised, and A. abated, and the eldest released within age and died without issue, and the other brought mortdanceslor, and recovered the whole of the feisin of the father; for she who released, never was seised and the release is void by reason of infancy; contra if she had made feoffment (nota differentiam) for then it had been good for a moiety and the one cannot be heir to the ancestor by reason of several venters. — Br. Releases, pl. 2. cites S. C.

[581]*

[4. If a man leases for life, rendering rent, and dies, having issue two sons by several venters, and the *eldest son dies before the rent-day*, the second son shall have it as heir to his father, because the eldest had not the actual possession. 35 Aff. 2.]

Br. Discent,
pl. 28. cites
S. C. which
was that A.
was seised
in fee and
leased the
land to J. S.
for life ren-
dering 14s.

* [5. But otherwise it would have been, if the rent-day had incurred in the life of the eldest, and he had received the rent, for this would have made an actual feisin in him. 35 Aff. 2.]

per annum to A. and his wife which A. had issue B by his first wife. and C. the plaintiff by the second wife, the rent was payable at Michaelmas and Easter, and A. survived Michaelmas, but he died before that he received the rent, and B. survived him and died before Easter, so that he had only a feisin in law of the rent, and no feisin in fact, and after B. died, and then J. S. tenant for life died and D. as cousin and heir of B. entered, and C. as heir of A. ousted him, and D. re-entered and incoffed E. against whom C. and her husband brought assize and recovered. And so see that the reversion shall be to the heir of the father of half blood, if it fall not in demesne to the son of the first venter in the life of the son. Br. Seisin, pl. 25. cites S. C. but Brooke says, Quere if the eldest son had had payment and had died in the life of the tenant for life, whether this feisin of the rent had been sufficient feisin of the reversion to disappoint the daughter of the half-blood.

If the father makes a lease for life, or a gift in tail and dies, and the *eldest son dies in the life of tenant for life, or tenant in tail*, the younger brother of the half-blood shall inherit, because the tenant for life, or tenant in tail is seised of the freehold and the eldest son had nothing but a reversion expectant upon that freehold or estate tail, and therefore the youngest son shall inherit the land as heir to his father who was last seised of the actual freehold Co. Litt. 15. a. — And albeit, a rent had been reserved upon the lease for life, and the eldest son had received the rent and died, yet it is holden by some that the younger brother shall inherit, because the feisin of the rent is no actual feisin of the freehold of the land. Ibid. — But 35 Aff. pl. 2. seems to the contrary, because the rent issues out of the land and is in lieu thereof, wherein the only question is, whether such a feisin of the rent be such an actual feisin of the land in the eldest son as the sister may in a writ of right make herself heir of this land to her brother. Co. Litt. 15. a.

If a man has issue a son and a daughter by one venter, and a daughter by another venter, and leases to another for term of his life without any rent reserved and dies and the reversion descends to his son who has issue a son and dies, and the son dies without issue, and then the tenant for life dies; the two daughters shall have the land notwithstanding there was a descent of the reversion to the son of the son; by the opinion of the Justices of C. B. And. 31. pl. 74. Mich. 7 Eliz. Anon. — Bendl. 143. pl. 202. S. C. held accordingly.

[6. If there be a gift to the baron and feme in special tail, the remainder to the right heirs of the baron, and they have issue, and the feme dies, and the baron takes another feme, and hath issue and dies, and the eldest son enters, and dies without issue, the second son of the half blood shall have the remainder, because the eldest was not seised thereof in his demesne. * 37 Aff. 4. adjudged; but there the reason is given, because the remainder did not commence till after the gift. † 24 E. 3. 30. b. 31.]

* Br. Dis-
cent, pl. 30.
cites S. C. ac-
cordingly,
where the
uncle of the
eldest
brought a
life as heir
to him, but
was barred

by award; for the remainder in fee cannot come into feisin till the tale be determined, and yet

it was in the eldest son to give or forfeit, but it was not in possession; for it is the possession which makes the heir of the eldest to be inheritable.——Fitzh. Assise, pl. 327. cites S. C.

† Fitzh. Descent, pl. 11. cites S. C. and S. P. as the case above except that in this the remainder was limited to the right heir of the feme, who had issue by the first baron and afterwards had issue by a second baron.——Co. Litt. 14. b. S. P. and cites S. C.

[7. If land be given to J. for life, the remainder to R. his son in tail, the remainder to the right heirs of J. and J. dies, and R. enters as tenant in tail, and dies without issue, T. the son and heir of J. of the half blood to R. shall have the land by descent, and not the heirs of R. because R. was never seised in fee in demesne. 39 E. 3. Descent, 5.]

[8. So if a gift be to another in tail, the remainder to his own right heirs, and after the donee dies, having issue a son by one venter, and a son by another, and the eldest son enters, and dies without issue, his brother of the half blood shall have the land by force of the remainder as heir to his father, because his brother was never seised of this estate in demesne.]

[582] [9. So if the eldest son be seised in tail, with a remainder or reversion by descent to him from his father in fee, and dies without issue, his brother of the half blood shall have this remainder or reversion by descent, because his brother was never seised thereof in demesne. 32 E. 3. Descent, 9. adjudged. 5 E. 3. Descent, 14. adjudged.]

[10. If a man seised of an advowson in gross hath issue a son and a daughter by one venter, and a son by another, and dies, and the eldest son dies before any presentation, the youngest brother shall have the advowson, because the elder never had any seisin thereof. 3 H. 7. 5.]

[11. But if the eldest had presented, and died without issue, the youngest brother should not have had the advowson, because this presentation puts the seisin in him. Fitz. Nat. 36. E. contra, 19 E. 2. Quare Impedit, 177. adjudged.]

S. P.——If a man recover an advowson, and after the bishop collates for lapse, the same is an execution of the judgment and will make a possessio fratris. Le. 234. pl. 316. Mich. 22 & 23 Eliz. B. R. Anderson Ch. J. cites 22 H. 6. per Moyle.

[12. If two daughters by several venters make partition of an advowson in gross, to present by turns, and after one dies without issue, before any presentation, the other shall have the advowson, because there was no seisin thereof. Fitz. Natura, 34 E.]

[13. But otherwise it would have been, if she that had died had presented after the partition. Fitz. Na. 34 E.]

[14. If lands descend to two coparceners, and they make partition, being of the half blood, and after one dies without issue, the other shall not have it, because she ought to have it as heir to her, and not as heir to the ancestor. Contra, 19 E. 2. Quare Impedit, 177.]

15. The indowment cuts off and destroys the seisin of the heirs. Br. Discent, pl. 19. cites 19 E. 2.

Br. Dower, pl. 87. cites S. C.——16. J. was seised and had issue, Robert the eldest, and Richard the youngest, and died, and Robert entered and took feme, and had issue

issue Alice, the feme died, and he took another feme and died, the feme privement ensient with a son, and the lord seised the ward of the land, and of Alice, for the nonage of Alice, and leased the ward to J. who endowed the feme of Robert, and after the feme is delivered of W. a son, by which the lord resealed the ward of W. and W. lived 10 years, and died without issue, by which H. the plaintiff entered as heir of Richard the youngest son of J. and Alice ousted him, and he brought assise, and prayed the discretion of the Justices. And because W. to whom Alice was of half blood, was seised, it was awarded, that Henry should recover. And so note, that the seisin of the guardian makes the heir of the infant of the entire blood to be heir, and the sister of the half blood was barred of the land, but by the opinion of the Court the dower of the feme shall revert to Alice, because W. was not seised of it, quære. Br. Discent, pl. 19. cites 8 Aff. 6.

Ibid. pl. 100. cites S. C. — Br. Seisin, pl. 18. cites S. C. & P. For of the dower the seisin of W. is defeated, and the feme is in by the baron, and the indentment was before the birth of W. But Brooke says, it seems that

all is one; for it is said elsewhere, that where the heir is seised, and endows his mother, and she dies, and a stranger enters, the heir shall have the mortdancer, and not assise of novel disseisin, and see Littleton, tit. Descents, that if the disseisor dies seised, and his feme is endowed by his heir, the entry of the disseisor is revived, for the third part put in dower. And P. 19 E. 2. where the heir takes feme, and enters and endows his mother, and aliens the reversion and the mother dies, and after the mother dies, the feme of the heir shall not have dower of the land of which the mother was endowed; for the seisin of the heir, who was her baron, was determined by the endowment, and the feme is in by her baron and not by the heir; for if the heir is charged, she shall hold discharged quod nota. And so see above, that the seisin of the lord of the ward is sufficient seisin for the infant to bring assise.

17. If a man has issue a son and a daughter by one venter, and a son by another venter, if the father dies seised, and the son dies before entry, the sister of his whole blood shall have the land, as heir * to her brother, and not the brother of the half blood, because the eldest brother had the possession cast on him, by course of law, and the freehold also was in him, and therefore the sister shall have the land, as heir to him, and not the younger brother of the half blood, &c. Kelw. 110. pl. 31. cites it as adjudged, 8 E. 3.

shall make immediate descent to him from his father, and not mention his brother, and yet the estate was in his elder brother to grant or charge, or intitle his wife to dower. Trin. 11 Car. B. R. Reeve v. Malster.

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Contra Jo. 361. where the father dies seised in possession, or of a reversion on estate for life, half blood shall inherit, and

18. In assise, if a man has issue three daughters by one venter, and one by another venter, and dies seised of land, and all enters and after two of the first venter die, the third of the first venter shall be heir to them, and shall have their two parts, and the fourth shall have only her fourth part, as before, and no part of the two parts; for she cannot be heir to them, because she is of half blood to them. Br. Discent, pl. 20. cites 10 Aff. 27.

19. A man has issue a son and a daughter by one venter, and a son by another venter, and gives his land to his eldest son in tail, the father dies, the fee descends to his eldest son, and the eldest son after dies without heir of his body, and by all the Justices of C. B. the youngest son shall have the land, and not the daughter. The reason seems to be, because it was in reversion, and cannot vest in possession to the eldest son, during the tail. Et possessio fratris, &c. facit sororem esse hæredem, and not reversio fratris, And

And Thorpe Justice of B. R. said, that the daughter shall have it, nevertheless, the law seems to be contrary. Br. Discent, pl. 13. cites 24 E. 3. 13.

20. Land was tailed by fine to baron and feme, and the heirs of the feme, who had issue two sons by divers barons, and they died, the eldest son entered and died without issue, and the youngest of half blood brought scire facias, and obtained; for possessio fratris or such like de feodo simplici facit sororem & esse hæredem, and here was no possessio, quod nota bene. Br. Discent, pl. 14. cites 24 E. 3. 30.

Br. Executions, pl. 67. cites S. C.—
The possession is the thing which makes the heir of the eldest to be inheritable.
Br. Discent, pl. 30. cites 37 Aff. 4.—
S. C. cited 3 Mod. 257. in Case of Kellow v. Bowden.

21. Scire facias upon a fine that was levied to J. and A. his feme in tail, the remainder to A. in fee, the baron and feme had issue a son, the baron died, and after the feme took another baron, and had issue another son, and died, the eldest son entered and died without issue, and the heir collateral of the eldest son entered as in the remainder in fee, against whom the youngest son of the half blood brought scire facias to execute the fee simple, and the best opinion was, that it well lay, for the fee simple was not executed in the eldest son, for he was seised in tail, and the fee was in abeyance. and therefore it was not executed in him, and now the youngest son of the half blood is heir to A. of the fee simple, therefore he shall execute it, and 37 E. 3. Lib. Assise, 4. it is adjudged for the youngest son, and yet the eldest son by feoffment might have given the fee simple, or charged it, or forfeited it by attainder of felony, but yet it was not executed in him, therefore whosoever is heir to the ancestor, when the fee falls, he shall have execution thereof, quod nota. Br. Scire Facias, pl. 126, cites 24 E. 3. 30. 62.

22. If the king be seised of land in jure coronæ, and of other land by purchase, or by reason of the duchy, and has a son and a daughter by one venter, and a son by another venter, and dies, the eldest son enters into all, and dies without issue, there the youngest son shall have the one land, and this seems to be de jure coronæ, and the daughter shall have the other land. Per Moyle Arg. which none denied. Br. Discent, pl. 5. cites 34 H. 6. 34.

[584] 23. A man had issue a son and a daughter by one venter, and three daughters by another venter, and enfeoffed four to perform his will, and after to enfeoff his heirs, and declared his will and died, the son died, the will not performed, and by the Reporter, the daughter by the first venter shall have subpœna, to have execution of the estate of the land of the feoffees, for the will is no impediment of possession of the use and possessio fratris of the use facit sororem esse hæredem to the use of the fee simple. Nevertheless, quære if it be possession, because the will is not fulfilled, nevertheless it is said here, that the taking of the profits of the land in use is such possession by the brother, as shall make the daughter of the whole blood to be heir as of land, but the one and the other must be of fee simple. And by the Reporter, the will to take the profits during a term, is no impediment, but that the brother has good possession, and e contra of a will, &c. to take the profits for life,
or

or other estate of frank-tenement; note the difference, for the one is in nature of a reversion, and the other not. Br. Discent, pl. 36. cites 5 E. 4. 7.

24. Feoffees are seised to the use of A. who has a son and a daughter by one venter, and two daughters by another venter, and makes a will [and devises] for years and dies, the eldest son dies within the years, yet the daughter shall be heir to the use, for *possessio fratris*, &c. contra where the will is for life. Br. Feoffments al' Uses, pl. 33. cites 5 E. 4. 7.

25. *Cesty que use* has issue a son and a daughter by one venter, and a son by another venter, and dies. The eldest son takes the profits, and dies, without issue. The use shall descend to the daughter, as sister and heir of him, and not to the younger son. Arg. D. 10. b. cites 5 E. 4. 7. 2.

There shall be *possessio fratris*, of an use of a *feignery*, a rent, an *advowson*,

of other hereditaments. Co. Litt. 14. b.

Possessio fratris cannot be of an use (though it was formerly held otherwise) for one cannot be possessed of an use, though one may be seised to an use. 2 And. 146. Hill. 41 Eliz. in Corbet's Case.

26. In trespass the defendant said, that J. N. was seised in fee, and took to wife A. and had issue the wife of the defendant, and A. died, and he took K. to wife, and had issue the wife of the plaintiff, and died, and the femes entered, and the one married the plaintiff, and the other the defendant, and so they held in common, judgment *fi actio*, the plaintiff confessed the bar, and said further, that J. N. had issue W. by the second wife, and the wife of the plaintiff, [and that] J. N. died, and after W. the son of J. N. entered as son and heir, and was seised, and died seised without heir of his body, and the wife of the plaintiff as sister and heir of the whole blood entered, and was seised till the trespass. Pigot maintained the bar *absque hoc*, that W. died seised, and the issue was suffered, and yet the seisin of the brother suffices, notwithstanding that he did not die seised, and *seisina fratris facit sororem esse hæredem*. Br. Traverses, per &c. pl. 108. cites 15 E. 4. 2.

27. If the disseisor dies seised, the entry of the disseisee is tolled, but if the heir of the disseisor endows the feme of the disseisor, there the disseisee may enter into the land assigned in dower; for she was in by her baron, and not by the heir, and so the descent removed. Br. Tenant per le Curtesy, pl. 10. cites Littleton tit. Descents.

28. Where a man dies seised, and has two sons of half blood, and the eldest dies before entry made by him, the youngest of the half blood shall have the land; *quod nota* the entry. Br. Discent, pl. 51. cites Littleton tit. Fee Simple.

To make *possessio fratris* of land there must be an entry, or

other actual seisin in the brother. Arg. Show. 246. Mich. 2 W. & M.

29. *Advowson* shall descend to the brother of the half blood, unless the first hath presented to it in his life-time; but if he has presented in his life-time, then it shall descend to the next heir of the intire blood. Dod. of Advowson, 21.

3 Rep. 41. b. S. P.—
Co. Litt. 15. b. S. P.—
Show. 246. Arg. S. P.—

3. P. if it be an advowson in gross. Br. Discent, pl. 32. cites 3 H. 7. 3.

30. *Recovery* by the brother, *without execution*, will not make the sister to be heir; for without execution, he has not possession, and so the execution makes the judgment full and perfect. Arg. Pl. C. 43. b. Mich. 6 E. 6. in Case of Wimbith v. Tailboyes.

And. 31. pl. 74. S. C. For in this case, the claim is from the father.

Jenk. 248. pl. 25. And the reason why there shall be a possession

fratris is, that every heir in fee simple in demesne ought to make himself heir to him who last died seised. Jenk. 248. at the end of pl. 25.

32. A copyholder in fee has issue a daughter and a son by two venters; the lord commits the custody of the land, and of the son, to the mother, who takes the profits, and the son dies before any admittance; this copyhold was ordered also for the heir collateral against the sister of the half blood, because the mother's possession serveth for the son. Cary's Rep. 8. cites 12 Eliz. D. 291.

33. Two daughters by two venters enter after death of their father, and take the profits jointly several years of a copyhold estate before any admittance of the lord; eldest dies without issue. Per 2 Just. The possession aforesaid is sufficient, without any admittance, to make the collateral heir inheritable, and it was ordered by the Lord Keeper accordingly. D. 291. b. pl. 69. Trin. 12 Eliz. Anon.

9 Le. 125. pl. 53. Mich. 25 Eliz. B. R. the S. C.—

And. 47. pl. 221. Cowper v. Burdold.

Trin. 17 Eliz. S. C.—

Bendl. 264. pl. 278.

Anon. S. C. and cites

the Case of Cower v.

Borough, S. P. adjudged accordingly, because it was against the intent and mind of the devisor,

by the words of the will as it appears.——But Palm. 373. Doderidge said, that if one has five daughters and devises all his land to one of them, she takes all by the devise and nothing by the descent; for her title is iure. And see Reading v. Roydon accordingly.

34. A. seised of land in fee has two daughters by several venters, B. the eldest, and C. the youngest; he devises a moiety of the said land to his wife for seven years, and that B. in die maritagii shall enter into the other moiety; A. dies, his wife enters and educates the daughters; B. enters with her husband into the other moiety; C. dies without issue; the heir of the whole blood of C. shall have her moiety. For the possession of the mother for seven years was an actual possession in C. and if the wife had not entered at all, the entry of B. although of half blood only, would have given possession to C. Adjudged in both Benches, Jenk. 242. pl. 25. cites 17 El. D. 342.

35. The husband is seised in right of his wife of certain customary lands in fee, and he and his wife, by licence of the lord, make a lease for years by indenture, rendering rent, have issue two daughters, and the husband dies; the wife takes another husband, and they have issue a son and a daughter, the husband and wife die, the son is admitted to the reversion, and dies without issue; and by

Manwood

Manwood that reversion shall descend to all the daughters, notwithstanding the half blood, for *the estate for years, which is made by indenture by licence of the lord, is a demise, and a lease according to the common law, and according to the nature of the demise the possession shall be adjudged*, which possession cannot be said possession of the copyholder, for his possession is customary, and the other is mere contrary, therefore the possession of one shall not be the possession of the other, therefore there shall be no *possessio fratris* in this case; but if one had been the guardian by custom, or *the lease had been made by surrender*, there the sister of the half blood should not inherit. And Mead said, the Case of the Guardian had been adjudged. 4 Le. 38. a. 103. Mich. 17 Eliz. C. B. Anon.

36. *Devisee for years enters*, that will make a *possessio fratris*. Jenk. 242. pl. 25. cites D. 342. [a. b. pl. 54. Trin. 17 Eliz. Anon.]

37. *Demesnes of a manor extend into two counties*, the eldest son enters into the demesne in one county only, and takes the profits in one county only, and dies without issue, his sister of the whole blood shall have and inherit the demesnes and services whereof her brother was seised, and her brother of the half blood the rest. Per Manwood J. Le. 265. pl. 355. 20 Eliz. C. B. in Bracebridge's Case.

38. The * possession of a † *termor for years*, is the possession of * Jenk. 241. him in remainder. Per Yelverton J. 4 Rep. 23. b. Trin. 26 pl. 5. S. P. Eliz. B. R. in Clerk and Pennyfeather's Case. per Clench J. Godb. 46. S. P.—

If a man has a son and daughter by one venter and makes a *lease for years* and dies, the eldest brother dies during the term, this is no impediment of possession, but that the eldest daughter of the whole blood shall be heir to him. Br. Discent, pl. 36. cites 5 E. 4. 7. — Co. Litt. 15. a. (k) S. P. and cites S. C.

39. There shall be *possessio fratris* of a *copyhold* before admittance, said per Wray Ch. J. to have been so adjudged lately. Fin. Law, 8vo. pag. 20. 4 Rep. 23. b. Trin. 26 Eliz. B. R. Clerk v. Pennyfeather. — For the seisin given to his ancestor is sufficient for him and all his heirs. D. 291. b. 69. and in Marg. 23 Eliz. Holmes v. Fane.

40. If a gift be to A. and the heirs of his body, and he has issue a son and a daughter by one venter, and a son by another venter; A. dies; the eldest son enters and dies; the youngest son shall inherit *per formam doni*; for he claims as heir of the body of the donee, and not generally as heir of his brother. 3 Rep. 41. b. Hill. 34 Eliz. B. R. in Ratcliff's Case. S. P. and the difference is between *fee simple* and *fee tail*. Br. Discent, pl. 31. cites 37 Aff. 16.

41. If a man has issue two sons by divers venters, and the elder purchases lands in fee simple, and dies without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin shall have the same, because the younger brother is but of half blood. Litt. S. 6.

42. If a man has issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchases land in fee, and dies without issue, the sister shall have the land by descent as heir to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother. Litt. S. 7.

U u 2

43. If

43. If there be two brothers by divers venters, and the elder is seised of land in fee, and dies without issue, and his uncle enters as next heir to him, who also dies without issue, now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him. Litt. S. 8.

44. If lands are given to a man and his wife and the heirs of their two bodies, the remainder to the heirs of the husband, and they have issue a son and the wife dies, and he takes another wife and has issue a son, the father dies, the eldest son enters and dies without issue, the second brother of the half blood shall inherit; because the eldest son by his entry was not actually seised of the fee simple, being expectant, but only of the estate in tail. And the rule is, that *possessio fratris de feodo simplici facit sororem esse hæredem*, and here the eldest son is not possessed of the fee simple, but of the estate tail. Co. Litt. 14. b.

45. If the father makes a lease for years, and the lessee enters and dies, the eldest son dies during the term before entry or receipt of rent, the younger son of the half blood shall not inherit, but the sister; because the possession of the lessee for years is the possession of the eldest son, so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heir. Co. Litt. 15. a.

[587] 46. If the eldest son enters and gets an actual possession of the fee simple, yet if the wife of the father be endowed of the third part, and the eldest son dies, the younger brother shall have the reversion of this third part notwithstanding the eldest brother's entry, because his actual seisin which he got thereby was by the endowment defeated. Co. Litt. 15. a.

47. But if the eldest son had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life. Co. Litt. 15. a.

48. Half blood is not respected in estates in tail. Because that the issues do claim in by descent, *per formam doni*, and the issue in tail is ever of the whole blood to the donee. Co. Litt. 15. b.

49. If a rent or an advowson descends to the eldest son, and he dies before he has seisin of the rent, or presents to the church, the rent or advowson shall descend to the youngest son, for that he must make himself heir to his father. Co. Litt. 15. b.

50. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. And this case differs from the case of the tenant, by the courtesy, for there if the wife dies before the rent day, or that the church become void, because there was no laches or default in him, nor possibility to get seisin, the law in respect of the issue begotten by him will give him an estate by the courtesy of England. But the case of the descent to the youngest son stands upon another reason, viz. to make himself heir to him that was last actually seised, as hath been said. Co. Litt. 15. b.

51. *Possessio fratris holds not of lands of the possessions of the crown*, nor half blood is no impediment to the descent of the lands of the crown, as it fell out in experience after the death of E. 6.

to Queen Mary, and from Q. Mary to Q. Eliz. both which were of the half blood, and yet inherited not only the lands which E. 6. or Q. Mary purchased, but the ancient lands, parcel of the crown also. Co. Litt. 15. b.

52. If the elder brother grants the reversion (expectant upon a freehold) for life, it shall cause possessio fratris. Co. Litt. 191. b.

53. In case of two sons or daughters by diverse venters and a remainder or reversion is purchased by the father upon estate for life, where the father dies, living lessee for life, and the eldest son or daughter die living lessee, half blood shall inherit; for in this case the claim is from the father. So where father is seised in fee, and eldest son after the death of his father dies before entry, the younger son of the half blood shall inherit. Otherwise, if the father made lease for years, and lessee entered, or had purchased remainder or reversion upon estate for years, and lessee entered, the half blood shall never inherit; for possession of this lessee serves both where the eldest son survives the father, being of half blood to the younger brother, and dies before entry, the youngest son shall inherit the land of the father. The law is, in case of possessio fratris, for the sister of the whole blood to be heir to her brother before the younger brother of half blood. The reason is, every heir for fee simple in demesne ought to make himself heir to him who last died seised. Jenk. 242. pl. 25.

And. 31. pl. 74. Mich. 7 Eliz. Anon. S. P. — Bendl. 143. S. P. — Jo 361. S. P. agreed per Omnes J. in Case of Rede v. Master.

54. A. has issue, B. a son, and M. a daughter, by one venter, and N. and O. daughters by another venter, and C. a son by a third venter, and devises all his land to his wife durante viduitate, and dies, the wife enters into all. B. before actual entry, dies. Adjudged, the will was void for a third part, and that the entry of the wife into all made her seised but of two parts and in common with her son of the third part and that the entry of the wife shall vest such possession in common in the son of the third part as shall make possessio fratris in him for his sister of the whole blood to inherit after the younger son. Mo. 868. pl. 1201. Trin. 12 Jac. C. B. Small v. Dale.

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55. If a rent service becomes rent seck, there shall be a possessio fratris. Jo. 234. Pasch. 7 Car. B. R. in Case of Faulkner v. Bellingham.

56. The Court inclined that the receiving rent by reversion on estate for life doth not make a possessio fratris. Allen, 89. Mich. 24 Car. B. R. in Case of Amys v. Cowley.

57. The descent between brothers differs from all other collateral descents whatsoever; for in other descents collateral the half blood doth inherit, but in a descent between brothers the half blood doth impede the descent, which argues that the descent is immediate. The uncle of the part of the father hath no more of the blood of the mother, than the brother of the second venter. The brother by the second venter hath the immediate blood of the father, which the uncle (viz.) the father's brother hath not, but only as they meet in the grandfather. The brother of the half blood is nearer of blood than the uncle, and therefore shall be preferred in the administration. And so it hath been resolved in 5 E. 6. in Brown's

Though the law will not allow one of the half blood to inherit, or be heir, yet there is no solid reason for it; for the uncle is not only more remote, but has but half

the blood he having none of the mother's blood, per the Master of the Rolls, who said, that our law takes the computation from the canon law, which shortened the degrees of relation to increase the number of dispensations from Rome, but the computation by the civil law is otherwise. 2 Wms's Rep. 667. Mich. 1734. in Case of Cowper v. Earl Cowper.

Case, and though the book of 5 E. 6. Br. Administration, 47. mistakes the law in preferring the brother of the half blood before the mother, yet it hath been right in the case of a competition between him and the uncle; and yet the *uncle is preferred in the descent before the brother of the half blood*, and the reason is, *because that is a mediate descent, mediante patre*; but the *descent to the brother must be immediate if at all*, and therefore the half blood impedes it. Again, it is apparent, that if in the line between brother the law took notice of the father as the medium thereof, the brother and brother by the second venter should rather succeed the other brother, because he is heir to his father; therefore *in a descent between brothers the law respects only the mediate relation of the brothers as brothers, and not in respect of their father*, though it is true, the bosom or foundation of their consanguinity is in the father and mother. Vent. 424. Pasch. 16 Car. 2. in Cam. Sacc. in Case of Collingwood v. Pace.

Mod. 120. pl. 22. S.C. adjudged. —Vent. 260. Batmore v.

58. *Admittance of particular tenant for years of copyhold land is admittance of him in remainder in fee to make a possessio fratris.* Adjudged. 2 Lev. 107. Trin. 26 Car. 2. B. R. Blackburn v. Graves.

Graves, S. C. adjudged. —3 Keb. 263. pl. 11. S. C. adjournatur. —Ibid. 329. pl. 24. Blackborough v. Graves, S. C. adjudged.

Fin. R. 216. Trin. 27 Car. 2. Edwards v. Allen, Webb and Shower, S. P.

59. *Seisin of an estate tail will not make a possessio fratris of a reversion expectant thereupon.* Arg. Show. 245. Mich. W. and M. in Case of Kellow v. Rowden. Fin. R. 216. Trin. 27 Car. 2. Edwards v. Allen.

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Holt's Rep. 166. pl. 11. Hill. 5 Ann. The Court gave judgment for the plaintiff, and Holt delivered the opinion of his brethren, viz. that the eldest son was in of the fee simple, for there was

60. Ejectment. D. seised in fee according to the *custom, which is, for lands to descend to the younger son, and the wife to have an estate during her life.* The father had *issue a son at one venter, and another by another venter*; the father dies, the wife enters, and then the youngest son dies without issue. 1. Whether the *intermediate estate of the wife* so broke the descent from the younger son, as to make the elder son of the half blood to the younger incapable of inheriting. Per Powell J. this customary estate for life he compared to the case of the freehold, which hindered the descent of the demean and freehold; and the Court seemed to incline strongly to construe the descent according * to the common law. Sed adjournatur. 11 Mod. 98, 99. Mich. 5 Ann. B. R. Brown v. Dyer.

no admittance upon the surrender which was made 4 Car. 1. and therefore the surrenderer did continue seised as he was before. Powell said, there could be no admittance by implication; to the second point he said, that the wife having this customary freehold after the death of her children, and the dying, then the eldest son should take as heir to the father according to estate at common law; and he said, where the custom is doubtful, it is the best way to follow the rules of the common law, as this Court did in the Case of Clements v. Scudamore.

61. Two daughters by a first venter being then heirs, on the death of their father their step-mother enters, takes the profits, held courts in the name of the daughters as heirs at law, cut down timber for maintenance, and three months after a son is born, who lived about nine months and died. It seems the possession of the mother shall be such a possession of the son as to carry the estate from the daughters to the heir of the son. But *Ld. Cowper* thought it a case of so much compassion, that he said he would give (the plaintiff, heir of the infant) no relief (as to the removing terms for years kept on foot by the daughters though the trusts were satisfied, by which terms the plaintiff was hindered bringing ejectments at law) unless it should appear that the daughters were otherwise provided for. *Ch. Pret.* 280. pl. 225. Pasch. 1709. *Whitcomb v. Whitcomb*.

62. A reversion in fee expectant on an estate for life is not sufficient to make a possessio fratris to exclude the issue by a second venter. Certified by the Justices of C. B. Mich. 1712. on a point referred by the Master of the Rolls for their opinion; Mich. 11 Ann. in *Case of Rawleigh v. Holland*.

(L) To the Half Blood. Of what Estate.

[1. AN estate tail may descend to the half blood, notwithstanding an actual seisin in the half blood before, for there he comes in by the statute de donis, and so as heir to the donee. * 37 Aff. 15. adjudged. 32 E. 3. Descent, 8. adjudged. 19 E. 2. Quare Impedit, 177.]

* Br. Discent, pl. 31. cites S. C. — 3 Rep. 41. b. in *Ratcliff's Case*, S. P.

and this is the reason why *Littleton* says, that possessio fratris de feodo simplici facit sororem esse hæredem. — *Co. Litt.* 15. b. S. P.

[2. But an estate in fee shall not descend from him that is actually seised in demesne of the estate to his brother, sister, or cousin, of the half blood. + 37 Aff. 15. admitted. ‡ 40 A. 6. adjudged.]

+ Br. Discent, pl. 31. cites S. C.

‡ *Mortdancer* by a

man against a woman of dying seised of her ancestor, the tenant pleaded that the plaintiff is not next heir, and it was found that the ancestor had a son, and this same tenant daughter by one venter, and this plaintiff son by another venter, and died seised, and the eldest son entered and died without issue, and his daughter now tenant entered, and now all the points of the writ is found for the plaintiff who is now heir of his father, &c. But because the sister tenant to the heir of the whole blood has the land, therefore notwithstanding the plaintiff was barred. *Br. Verdict*, pl. 77. cites 40 Aff. 6. — *Br. Verdict*, pl. 101. cites S. C. — *Br. Mortdancer*, pl. 47. cites S. C.

3. The brother must be in actual possession; for possessio est quasi pedis positio. 2dly, *De feodo simplici*, exclude estates in tail. 3dly, *Facit sororem esse hæredem*. So as soror est hæres facta; and therefore some act must be done to make her heir, and the youngest son is hæres natus, if no act be done to the contrary. And albeit the words are *facit sororem esse hæredem*, yet this extends to the issue of the sister, &c. who shall inherit before the younger brother. *Co. Litt.* 15. b.

[590]

3 Rep. 42.
s. S. P. ac-
cordingly
by the Re-
porter near
the end.
Ratcliff's
Case.—
Cro. C. 601.
pl. 4. Hill.

4. *Dignities* whereof no other possession can be had but such as descend (as to be a duke, marquis, earl, viscount, or baron) to a man and his heirs, *there can be no possession of the brother to make the sister to inherit*, but the younger brother being heir (as Littleton saith) to the father, shall inherit the dignity inherent to the blood, as heir to him that was first created noble. Co. Litt. 15. b.

pl. 4. Hill. 16 Car. S. P. was moved in parliament, and resolved accordingly by all the Justices.

(L. 2) To take away an Entry. In what Cases.

1. **I**T seems that a *usurpation within the year* cannot be an interruption, and a descent cannot toll entry of the lord who enters for *mortmain*; for he has no right of entry, but only a title of entry, which may be taken any time within the year. Br. Quare Impedit, pl. 40. cites 18 E. 3. 121.

2. If a man *levies a fine and after dies seised before execution*, yet the entry of the consuee upon the heir is lawful, as well after the year as within the year; *e contra* of re-entry and dying seised after execution had. Br. Discent, pl. 46. cites 33 E. 3. and Fitzh. Title, 4. and 14.

3. *But if a man enters upon the tenant pending the writ and dies seised*, and the demandant recovers, yet the recoveror cannot enter upon this descent, and yet the tenant and his feoffee shall be bound notwithstanding the descent in them, for they are in the per, contra of the disseisor; for it is admitted to be an entry without title, for otherwise it should abate the writ. Br. Discent, pl. 46. cites 33 E. 3. and Fitzh. Title, 4. 14.

4. Where a man has *issue two sons and dies seised*, the eldest son being beyond sea, and the youngest son enters and dies seised, and so to the fourth degree, and the eldest dies and his issue to the seventh degree, and the other continues for eighty years, and the issue who came of the eldest son enters, his entry is lawful by reason of the privity of the blood; per Wichenham and Tankerville, quod nullus negavit. But *e contra*, if the eldest had entered, and the youngest had disseised him and died seised, the entry shall be tolled. Note, a diversity, for in the one case, where the eldest does not enter, the youngest has colour as heir; contrary where the eldest does enter. Br. Entre cong. pl. 6. cites 40 E. 3. 24.

5. A descent *within the year after alienation in mortmain* does not take away the entry within the year, for it is *only title of entry*, and not right of entry; for upon right of entry he may have an action. Br. Entre cong. pl. 13. cites 47 E. 3. 11.

6. If a *bastard purchases in fee and is disseised*, and the disseisor gives in tail by fine the remainder over in fee, the tenant in tail dies without issue, and he in remainder enters, there the entry of the disseisee is lawful. Br. Entre cong. pl. 17. cites 3 R. 2.

7. If

7. If an infant be a disseisor, and another man disseises and dies seised, and his heir is in by descent, the entry of the first disseisee is taken away; but if the infant enters or recovers the first disseisee may enter, and so see that the entry of one shall give advantage to a stranger. Br. Entre congeable, pl. 38. cites 4 H. 6. 2. 3.

8. If J. enfeoff a man upon condition, and the feoffee is disseised, and the heir of the disseisor in by descent, or the feoffee makes a feoffment over and the heir of the second feoffee is in by descent, yet J. may enter upon the descents for the condition broken, for such descent does not take away my entry; for I have no other remedy, nor no action but only entry; per Newton. Br. Entre cong. pl. 34. cites 21 H. 6. 17.

9. But where my tenant for life aliens in fee, there I may have an action; for there if a descent be had I cannot enter, but am put to my action; quod nota. Per Newton. Br. Entre cong. pl. 34. cites 21 H. 6. 17.

10. In trespass the defendant justified, inasmuch as W. was seised in fee and leased to one Alice at will, by which he as servant of A. and by her command entered, &c. and gave colour, to which the plaintiff said that S. was seised and died seised, and the land descended to the plaintiff as cousin heir, and shewed how, by which he entered and was seised till the defendant did the trespass, & adjournatur. Br. Titles, pl. 42. cites 33 H. 6. 49.

11. Descent to J. N. as heir, where the king has title, does not toll his entry; per Littleton. Br. Discent, pl. 60. cites 35 H. 6. 37.

12. If a man recovers against another, and after there are three or four descents before his entry, yet he may enter upon the descents, because the recovery binds the blood and disproves the title of the tenant. Br. Discent, pl. 37. cites 6 E. 4. 11.

seised, the entry of the recoveror upon the heir of J. is lawful; for the possessor is bound by the judgment; contrary if execution had been had, and after J. had re-entered and died seised for this is a disseisin after execution. Br. Discent, pl. 45. cites 39 E. 3. and Fish. Title, 3.

If a man recovers against J. by judgment and after J. dies

13. Dying seised in tail tolls the entry, but not where he dies without issue of his body, for then there is no descent, per Fairfax. Br. Traverse per &c. pl. 266. cites 21 E. 4. 65.

14. Where a fine and recovery is pleaded in bar in assise, dying seised after this in him or his heir against whom the fine or recovery was had, is no title, for the entry is lawful upon them; but contra by Fisher, if the fine or recovery be executed, and after he, who confesses or loses, and enters dies seised, this tolls the entry; quære hoc. Br. Titles, pl. 37. cites 5 H. 7. 30.

15. If a man be disseised and goes beyond sea, or is imprisoned after, and descent is had he cannot enter. Per all the Justices. Br. Entre congeable, pl. 91. cites 9 H. 7. 24.

16. Contrary if he was within age at the time of the disseisin, and after goes beyond sea or is imprisoned. Per all the Justices, and Serjeants at law. Br. Entre congeable, pl. 91. cites 9 H. 7. 24.

17. Nota per omnes, that in assise of rent, if the plaintiff makes title by dying seised of his father, and descent to him, this is not material

terial of rent in gros, quod nota. And therefore it seems that it shall not be any bar in assise of rent in gros. Br. Titles, pl. 64.

*[592] cites 10 H. 7. 23.

The *feoffee* of a *disseisor* is out of the said statute, and remains as at the common law. But to a *disseisor*, the

statute is taken favourably for the advancement of the ancient right. For whether the *disseisin* be without force, or with force, it is within the statute. Co. Litt. 238. a.

† And albeit the statute speaks of him that at the time of such descent had title of entry. &c. * or his heirs, yet the *successors of bodies politic or corporate*, so you hold yourself to a *disseisin*, are within the remedy of this statute; for the statute extends clearly to the predecessor being *disseised*; and consequently without naming his successor extends to him; for he is the person that at the time of such descent had title of entry. Co. Litt. 238. a.

But if a man makes a lease for life, and the *lessee for life is disseised*, and the *disseisor dies seised within five years*, the lessee for life may enter; but if he dies before he does enter, it is said, that the entry of him in reversion is not lawful, because his entry was not lawful upon the disseisor at the time of the descent, as the statute speaks. Co. Litt. 238. a.—Pl. C. 47. Arg. S. P.

But if *lessee for life had died first*, and then the *disseisor had died seised*, he in the reversion had been within the remedy of the statute; because he had title of entry at time of the descent as the statute speaks, and so within the express letter of the statute, albeit the *disseisin* was not immediate to him, and the like is to be said of a remainder, &c. Co. Litt. 238. a.

It is said, that *abators and intruders* are out of this statute, because the statute is penal, and extends only to a disseisor, and that was the most common mischief. Co. Litt. 238. a.—Pl. C. 47. a. Mich. 4 E. 6. S. P. Arg.

This statute extends not to any *feoffee or donee of the disseisor* immediate or mediate, but they remain still at the common law. Co. Litt. 256. a.

The preamble has the words of *disseisin with force*; and the *parview helps such disseisins*; yet this statute is expounded by equity to extend also to *disseisins without force*; for the mischief is equal; and the statute provides against the mischief which was at common law; such was this *disseisin* last mentioned. The disseisor dies seised within two days after the *disseisin*, without entry or claim made; now neither the disseisee nor his heir can enter upon the heir of the disseisor, Jenk. 226. pl. 88.

Note, that it is ruled in the Serjeant's Case, that where a common person leased land for years, rendering rent with clause of re-entry, and after grants the reversion over, and the tenant storns, the grantee may re-enter for the condition broken by this statute by express words. Br. Entre congeable, pl. 139. cites 4 M. 1.

So of the grantees of King E. 6. and all other heirs to King H. 8. by the equity of this statute, which provided remedy for the patentees of King H. 8. and for grantees of common persons. Br. Entre conge. pl. 139. cites 4 M. 1.

19. A. seised of land in knight service, leased it to J. S. Habend to J. S. and J. N. for their lives rendering rent, then A. devised it to M. for life, remainder to W. R. in fee, which was void for a third part and died. B. the heir of A. by attorney, entered and infeoffed J. N. who died seised. J. N. before the feoffment was in possession, and claimed to be in as lessee, and paid the rent to M. But being no party to the lease, it was void as to him, and that he was not tenant at will, when the attorney entered and infeoffed him, and so was not in possession for his lessor M. but if he was tenant at will, his taking the feoffment of a stranger determined his will, and so his entry cannot reduce the possession to M. Quacunque via, it is a descent, and tolls the entry. Cro. E. 115. pl. 16. Mich. 30 and 31 Eliz. B. R. Reynold v. Kingman and Brown.

20. Devisee

20. Devisee by a *devise* hath but a title of *entry* which shall not be bound by any descent, *as entry for mortmain or for condition broken*. Le. 210. pl. 293. Mich. 31 and 32 Eliz. C. B. *Mathewson v. Trot*. Ow. 141. S. C. The case was this, a man seised of land in

fofage, devised it to his younger son and died seised, the elder son enters and dies seised, and his heir enters, and the younger son enters upon him, the question was, if his entry be taken away by this descent. Judgment was given by Anderson, that this descent does not take away the entry of the devisee.

S. P. Cro. C. 801. for then he might not maintain any action, never having had any seisin and so should be without remedy, where there is only a descent and no binding matter of bar.

21. If *tenant pur auter vie* continues in possession after the death of *cestuy que vie*, he is but tenant at sufferance, and his descent shall not take away an entry. This was said by Wray to be held at an assembly of all the Justices, to which Gawdy agreed, and that 18 E. 4. 25. is not law. Cro. E. 238. pl. 5. Trin. 33 Eliz. B. R. in *Case of Allen v. Hill*.

22. Devise in fee to his heir, with a *limitation over*, on non-payment of legacies, and descent in the interim, shall not toll the entry of the devisees, for it is not as a descent *by a stranger* after a devise before the entry of devisee, which perhaps tolls the entry, because it is not as an immediate devise, but it is quasi a devise on a limitation, or upon a condition broken, which no descent shall take away or prejudice. Cro. E. 919. pl. 14. Hill. 45 Eliz. B. R. *Hainfworth v. Petty*.

23. If one disseises another in time of war, which is called *occupation*, and dies seised also in time of war, disseisee may enter. [593]
Hawk. Co. Litt. 334. Co. Litt. 8. 412.—In times of domestic wars when

the courts of justice are not open, the descent gives no right of possession, though the disseisin was done in time of peace, for it were in vain for a disseisee to exert his right of possession, when the courts of justice are not open; nor can there be any such thing as the act of law to give a right of possession when the law itself is silent; but in times of foreign war, when there is justice and peace at home, a descent will give a right of possession; for to encourage enterprizes in such war was such privilege given to the heir of the disseisor. Gilb. Treat. Ten. 31, 32.

24. No dying seised (*where the tenements come to another by succession*) shall take away the entry of any person, &c. *as of prelates, abbots, priors, deans, or of the parson of a church, or of other bodies politick*, &c. albeit there were 20 dyings seised, and 20 successors, this shall not put any man from his entry. Litt. S. 413. A succession does not give a right of possession, as a descent does; for a

successor is in by his own act; for it is by his own concurrent act, that he comes to be installed into the rights of his predecessor, and therefore he can have no more than he had; but since the predecessor had a naked possession, and not the *jus possessionis*, the successor can have no more. Besides, the successor pays no relief, unless by grant or prescription; for ecclesiastical lands were not relieved into the hands of the lord for want of a tenant being given in free-alms, or to do service by proxy; and since the lands are not received into the hands of the successor for a consideration paid, he doth not acquire a right of possession. Besides there is no reason to encourage the predecessor to dare in war, who either went not at all, or else by proxy; and therefore no reason such succession should get a right of possession. Gilb. Treat. of Ten. 32.

25. A disseisor makes a lease to a man and his heirs during the life of J. S. and the lessee dies, living J. S. this shall not take away the entry of the disseisee. 3 Wms's Rep. 368. in a note to the Reporter, cites 1 Inst. 239.

26. Descents

26. Descents which toll entries are two sorts, viz. where the descent is *in fee, or in fee tail*. Co. Litt. 385.

27. If a disseisor dies seised, and his heir enters, and endows his wife of the third part, the disseisee may enter on that, for she is in by her husband, and the law judges no mean feisin betwixt husband and wife. Hawk. Co. Litt. 326.

28. If a disseisor has issue, and entered into religion, by force whereof the lands descend to his issue, this does not toll the entry of the disseisee. Litt. S. 410.

29. If a dying seised takes not away the entry of him that right has at the time of the descent, it shall not by any matter *ex post facto* take away his entry. Co. Litt. 241. b.

*[594]

Litt. S. 394.
S. P. and
though at
the end of
the session
it is added,
that the con-
trary is held,
Falsch. gH. 7.

30. A descent which tolls entry ought to be an immediate descent; and therefore if a feme disseisorels take husband, and has issue and dies, and after the husband dies, the descent to the issue does not take away entry, because the interposition of tenant by curtesy does impede it. Per Holt Ch. J. at Nisi Prius. 1 Salk. 241. pl. 1. Hill. 6 W. & M. Carter v. Tash.
per tot. Cur. and Mich. 37 H. 6. yet Ld. Coke says, that this is an addition and to be passed over, and that at this day this Case of Littleton is holden for clear law. — And Ld. Coke says, that here was a descent of a reversion at the time of the dying seised; * for the estate of a tenant by the curtesy had commencement by having of issue and is consummate by the death of the wife, so as the fee and franktenement did not after the decease of the wife descend to the heir, and albeit the tenant by the curtesy dies afterwards, and that the franktenement is cast upon the heir, so as now he has the fee and franktenement by descent, yet because the heir came not to the fee and franktenement at once immediately after the decease of the wife, such a mediate descent shall not take away the entry of the disseisee. On the other side, an immediate descent may take away an entry for a time, and immediately may be avoided by matter *ex post facto*, as hath been said. Co. Litt. 241. b.

31. If a man be disseised and the disseisor dies in peaceable possession immediately after such disseisin, the heir acquires *jus possessionis*, if the disseisee suffers the ancestor quietly to enjoy; for the presumptive right is then in the heir; but if the disseisee has re-entered within a year and a day before such descent, then the heir doth not acquire the *jus possessionis*. First, because there is no laches in the disseisee, and the act of law would do wrong and injury (which it cannot do) if it should alter the right when the disseisee has done, what in him lay, to continue the right of possession. Secondly, Because there is no presumption that the disseisor had right if the disseisee continues the claim; for the law cannot presume the right of possession to be derelict contrary to the manifest act of the disseisee. Thirdly, The lord ought not to take the heir for his tenant; and there is sufficient warning for the ancestor in his life-time not to do the voluntary service, nor for the heir after his decease to pay the relief. Gibb. Treat. of Ten. 33.

(M) *To take away an Entry.*

In what Cases where the Entry is given by a Record.

[1. IF a man recovers against another that is seised in fee, and after the recoverer dies seised, and it descends to his heir, yet this descent shall not take away the entry of the recoveror, because he had but a title of entry, and the entry is to execute the judgment, and so relates to it, being executory against the heir that is privy to the judgment that it binds the blood. Contra, * 49 E. 3. 23. b. 7 H. 7. 14. b. 16 H. 7. 8. b. agreed clearly per Curiam. 3 E. 4. 7. † 6 E. 4. 11. b. 3 H. 7. 3. per Browne. 5 H. 7. 31. b. || 21 H. 6. 17. b.]

* Fitzh. Entre Congeable, pl. 35. cites S. C. — Br. Entre Congeable, pl. 35. cites S. C. — † Br. Discent, pl. 37. cites S. C. that, tho'

there are three or four descents before his entry, yet he may enter upon the descents, because the recovery binds the blood and disproves the title of the tenant. — Fitzh. Mortdancer, pl. 8. cites S. C.

|| Br. Barr. pl. 16. cites S. C. — Co. Litt. 237. b. 238. a. S. P. and cites same Cases.

[2. So if the recovery be against tenant in tail that dies seised, this descent to the issue shall not take away the entry of the recoveror, for the cause aforesaid. 33 E. 3. Entry Congeable, 51.]

[3. So if I acknowledge the right to another by fine, and he grants and renders it to me again, and after dies seised, this descent shall not take away my entry, because the fine was executory; (it seems 33 E. 3. Entry Congeable, 51. is intended of a fine come ceo which is executed.)]

[4. If a man recovers against A. who after dies, having issue bastard eigne and mulier puisne, and the bastard enters, and dies seised, and this descends to his issue, this descent shall not take away the entry of the recoveror, for the continuance of the bastard hath * made him as heir, and so privy to the recovery. 5 H. 7. 2. But quere, the issue himself cannot bastardize his father.]

[595]* Br. Entre Congeable, pl. 104. cites S. C. and Brooke says, Et sic vide, that after recovery, the

entry is lawful upon him that comes in as heir to the tenant who lost, for this title is bound; but contra if disseisor enters and dies seised; note the diversity, for he is not in properly as heir. — Ibid. pl. 133. cites S. C. & S. P. accordingly by Fairfax and Keble; but this was denied by others; Brooke says the reason seems to be because they are not heir; and that so it seems, that after the recovery, if one disseises the tenant before execution and dies seised, and his heir enters, that the entry of him who recovered is taken away.

[5. If a man recovers land, and after a stranger to the recovery dies seised, yet this shall not take away the entry of the recoveror, because it was but a title, and the title relates to execute the recovery of the judgment.] See the notes to Pl. 4.

[6. If a man recovers against another, and enters and sues execution, and after the recoverer disseises him, and dies seised, this descent shall take away the entry of the recoveror, for the recovery was executed, and cannot be executed again, and this is a puisne title. 3 E. 4. 7. Contra, * 10 H. 7. 5. b. Quere, 7 H. 7. 15. 5 H. 7. 31. b.]

* Br. Titles, pl. 63. cites S. C. Hufsey Ch. held that a man shall not make title after an act of parliament, fine or recovery, unless by matter of later time; for by such act against his father, if he enters again and dies seised, and his heir enters, this will not make a title to the heir, without shewing title

ment, fine or recovery, unless by matter of later time; for by such act against his father, if he enters again and dies seised, and his heir enters, this will not make a title to the heir, without shewing title

title since the recovery, &c.——Kelw. 45. b. pl. 4. Trin. 17 H. 7. it was held for clear law in C. B. as well by all the Bench as the Bar, that such disseisin and descent after the recovery executed shall not toll the entry of him that recovered; for the heir of the recoveree is privy and bound by the recovery, but *otherwise it is of a fine*, and in margin cites all the same cases in the plea of Roll, in H. 7.'s time.——Kelw. 170. a. pl. 2. Mich. 6 H. 8. S. P. held accordingly; but that if a stranger enters and dies seised, then the recoveror is put to his seire facias, per Guy Palmea, but the book says, Tamen quare.——Co. Litt. 237. b. 238. a. says, That if after the execution of the recovery, the recoveree *disseises the recoveror and dies seised*, this descent shall take away the entry of the recoveror, but otherwise if it be before execution.——*Descent before execution* shall not take away the entry of the recoveror, because the title is bound and he can have no other remedy. Br. Entre Congeable, pl. 34. cites 21 H. 6. 17. per Newton.——Co. Litt. 238. a. in principio, S. P. that if after execution the recoveree had disseised the recoveror and died seised, this descent shall take away the entry of the recoveror within the express words of Littleton; and that so it is in case of a *fine*.

If a man
recovers
land and
the tenant
after dies
seised and
so suffers

7. If a man recovers against one who has aliened pending the writ, and the alienee dies his heir within age, the demandant may enter upon the heir within the year; for by the judgment *the title of the feoffor is bound*. Per Thirning and Tirwhit. Br. Entre Congeable, pl. 18. cites 2 H. 4. 16, 17.

Several descents, yet he who recovered may enter, for the *title is bound*, and so by consequence upon the heir of the alienee of him who lost by the recovery; for he cannot be in a better condition than the tenant who lost, per Nele serjeant, which was not denied. Br. Entre Congeable, pl. 116. cites 6 E. 4. 11.

8. A recovery is had against tenant for life, where the remainder is over in fee. Tenant for life dies; he in the remainder enters before execution, and died seised. The entry of the recoverer is lawful, because he is *privy in estate*. Otherwise it is, if the descent had been after execution. Co. Litt. 238. a.

[596] (N) Of what Things a Descent shall take away an Entry.

4 Rep. 23.
a. pl. 5.
Mich. 35 &
36 Elin.
B. R. the
S. P. ad-
judged.

[1. IF a copyholder in fee in fact upon an admittance dies seised of a copyhold, and it descends to his heir, yet it shall not take away the entry of another that has right to the copyhold. Mich. 15 Jz. B. R. between Lee and Browne, agreed per Curiam, upon evidence at the bar.]

Gravenor v. Todd.——Poph. 33. 35. Gravenor v. Brook, S. C. that he had no right to be copyholder of it, and therefore cannot die seised of it as a copyholder, and by the dying seised of a copyholder at common law, it shall be no prejudice to him that has right; for he may enter; but here coming in by admittance of the lord at the Court, the occupation cannot be tortious to the lord, and therefore was no descent at common-law by the copyholder's de facto dying seised; because it was only an occupation at will.——Descent of a copyhold shall not take away an entry. Mar. 6. pl. 12. Pasch. 15 Car.——See the Case of Joyner v. Lambert at sit. Copyhold. (D. b) pl. 9.

2. King R. 2. had land in ward by descent from King E. 3. For chattle shall descend in case of the king, contrary of a common person, and granted the lands by letters patents, to W. for life, the remainder to J. in fee. Br. Aid del Roy, pl. 28. cites 7 H. 4. 41.

3. It was held that descent of a rent does not take away an entry, but he may distrain be it parcel of a manor or not, but otherwise it seems

seems to be if the descent be of the manor. Br. Entre cong. pl. 98. cites 5 E. 4. 6.

4. If a man receives my rent in gross without authority and dies seised thereof, yet I may after distrain; and *contra*, where the rent is parcel of a manor and he receives it and enters into the demesnes and dies seised by disseisin; but if he disseises me of the demesne, and dies seised without receipt of the rent, there I may distrain. Note, a diversity, for he is not my disseisor but at my pleasure. Br. Entre cong. pl. 131. cites Littleton Tit. Attornments.

5. Where a man is seised of a manor and gives parcel of it in tail, rendering rent, and is disseised of the manor, and the tenants of the manor and the tenant in tail pay their rents to the disseisor, who dies seised, this does not toll the entry nor distress of the rent reserved upon the gift in tail, for by the gift this land is severed from the manor for the time, and the reversion remains in the donor, and the rent is incident to it, and therefore by the seisin of the donee in the land, the donor may distrain him for the rent. Br. Entre cong. pl. 131.

6. So of a lease for life or years of land parcel of a manor rendering rent, the payment of the rent to a stranger is no bar to the lessor to distrain for his rent, so long as the tenant continues possession in the land demised, &c. Br. Entre cong. pl. 131.

7. Descents of inheritance which lie in grants, as advowsons, rents, commons in gross, &c. which are inheritances incorporeal, do not put him that right hath to an action. Co. Litt. 237. b.

(N. 2) To take away an Entry.
Of what Estates.

[597]

1. DESCENT of rent shall not take away the distress of the disseisee, be the rent parcel of a manor or not, by the opinion of the Court. But per Littleton tit. Descent, if it be parcel of a manor, and the tenant attorns, this shall take away the distress of the disseisee, for there it is of the nature of the land contrary of a rent * in gross. Br. Discent, pl. 63. cites 5 E. 4. 6.

* Br. Discent. pl. 66. cites 5 E. 1.

2. Stranger erects a shop in a vacant piece of ground in the king's manor and enjoys it, paying no rent, the king grants the manor to A. who never enters into it or takes any rent for the shop; the occupier of the shop dies in possession and his son enters; per 4 Justices it is no descent, but Manwood and Wray, Serjeants, e contra. D. 266. b. pl. 10. Anon.

Marg. Ibid. cites Plow. Quæres 381. that no possession is gained thereby—and cites to the same

purpose 31 Eliz. B. R. that it was agreed upon evidence that in this case the lord may grant over his interest without entry upon the occupier, but if the lord enters, and the other keeps possession, then it is otherwise, for then it is a disseisin.

3. Descents in tail which take away entries are, as if a man be disseised, and the disseisor giveth the same land to another in tail, and the tenant in tail hath issue and dieth of such estate seised, and the issue

issue enters, in this case the entry the disseisee is taken away and he is put to sue against the issue of the tenant in tail a writ of entry sur disseisin. Litt. S. 386.

If a disseisor, at the time of his death, has not the freehold in him, 4. Note, that in such descents which take away entries, it behoveth that a man *dies seised in his demesne as of fee or of fee tail;* for a dying seised for *term of life*, or for term of *another man's life*, doth never take away an entry. Litt. S. 387.

it cannot be cast upon his heir; for then there is no danger that the freehold should want a possessor; therefore the law creates no title to such possession in the heir at law; for it were incongruous that the law should suppose the right of possession in the heir, when the possession is in another at the death of the ancestor. The law will not afterwards create him a new title, in prejudice of the person that has the right of propriety. Gilb. Treat. of Ten. 19.

If the disseisor therefore makes a lease for life, he parts with the possession, and cannot transmit to the heir, since he had parted with it at the time of his death, and the *descent of a reversion will not make a right possession*, for nothing descends to the heir in reversion, but the right of the reversion and that is a right against all other persons but the disseisee. For since only the right descends, the heir can be in no better case than the disseisor was at the time of his death; and therefore when tenant for life dies, he has only the naked possession, as the disseisor had it. But if the disseisor had died in possession, the law, for the reason aforesaid, casting the possession on the heir, makes it a right; for that is properly a right which a man comes to by the act of the law; and since the heir in such case would come to the possession by the act of the law it must be called a right of possession; and it could not be a right of possession, if he could not defend it against all aggressors. Therefore in such case the right of entry is taken away from all others; and hence the distinction came to be made between *jus possessionis* and *jus proprietatis*. Gilb. Treat. of Ten. 19, 20.

S. P. Br. 5. If he in the *reversion disseises his tenant for life*, and dies seised; this descent shall take away the entry of the tenant for life. Co. Litt. 239. a.

Entre Con-
geable, pl.
9a. cites
9 H. 7. 24. per Fairfax.

[598] 6. So it is if there be *tenant for life, and the remainder in tail, the remainder in fee, and tenant in tail disseises the tenant for life,* and dies seised. This shall take away the entry of the tenant for life. Co. Litt. 239. a.

The disseisor is seised in fee. Br. Entre Con-
geable, pl. 9a. cites 9 H. 7. 24. per Fairfax, and this case was agreed per tot. Cur. by good advice.

If a disseisor makes a lease for life and then dies seised of the reversion, this 7. Descent of a *reversion or remainder*, does not take away an entry. So as in those cases which take away entries by force of descents, it behoveth that he dies *seised of fee and freehold, or of fee tail and freehold* at the time of his death; or otherwise such descent doth not take away an entry. Litt. S. 388.

takes not away the entry of the disseisee. And so if he makes a *lease for his own life and dies*, the disseisee may enter, for though the fee and freehold descended from the disseisor, yet he died not seised thereof. But if he only makes a *lease for years, or suffers execution of a judgment in debt and dies*, the disseisee cannot enter. Hawk. Co. Litt. 325.

To a title of entry for condition broken no descent shall take away entry; per Walmley. 8. If a man be *seised of certain land in fee or in fee tail upon condition*, to render certain rent, or upon other condition, albeit such tenant seised in fee or in fee tail, *dieth seised, yet if the condition be broken in their lives, or after their decease*, this shall not take away the entry of the feoffor or donor, or of their heirs, for that the tenancy is charged with the condition, and the state of the tenant is conditional in whose hands soever it cometh, &c. Litt. S. 391.

9. Also

9. Also if such tenant upon condition be disseised, and the disseisor dies thereof seised, and the land descends to the heir of the disseisor, now the entry of the tenant upon condition, who was disseised, is taken away. Yet if the condition be broken, the feoffor or the donor which made the estate upon condition, or their heirs, may enter *causa qua supra*: Litt. §. 392.

Ow. 141.
Obiter, 8a
& 33 Eliz.
in Case of
Mathewson
v. Trout.—
In the case
of a feoff-
ment upon

condition, there is no distinction between the right of possession and the right of propriety, but both rights are in the feoffee till the condition broken, and entry for such breach, and afterwards both rights are in the feoffor; therefore the descent does not take away the entry, since the possession and the propriety descends in the same manner; viz. under the condition that it was at first granted; and the possession is not cast upon the heir while the propriety is in somebody else, as in the former case, and it is the descent of a naked possession to an heir at law, that forms a *jus possessionis*, distinct and abstracted from the *jus proprietatis*. But here both rights are united at the time of the descent; and if the feoffor in this case could not assert his claim by an entry he could have no remedy either for his *jus possessionis* or *jus proprietatis*, which are not here separate or distinct; for till he enters to take advantage of the breach of the condition, both rights are in the feoffee, because the solemnity of the feoffment cannot be determined but by an act of notariety, and because the possession and right are not here separate or distinct, it is called by a different name, viz. not a right, but a title of entry. Gilb. Treat. of Ten. 22, 23.

10. If the disseisor makes a lease to a man and to his heirs during the life of J. S. and the lessee dies, living J. S. this shall not take away the entry of the disseisee, because he that died seised had but a freehold only; and heirs in that case were added to prevent the occupant, for the heir in that case shall not have his age as it was adjudged in Lamb's Case. Co. Litt. 239. a.

11. A lease is a covenant real, that binds the possession of lands into whose hands soever afterwards they come, if the lands be not evicted by a superior title; but the termor has not the freehold in him, but holds the possession as bailiff of the freeholder, nomine alieno by virtue of the obligation of the covenant. Therefore if such termor is ousted, and the freeholder disseised, the disseisor has the naked possession bound by the covenant, and if afterwards a descent is cast, the heir of the disseisor has the right of possession, bound also by the covenant; for the heir of the disseisor has only the right of possession which was in the disseisee, and that was bound by that covenant, and therefore it must be bound by the same covenant in the hands of the heir of the disseisor; and where it is otherwise, the right of the termor would be intirely destroyed: for he cannot have a right of possession distinct from the right of propriety. [599]
Gilb. Treat. of Ten. 30, 31.

(N. 3) Descent to toll an Entry,
Bound thereby who; and where they claim by the
same Title.

1. IF tenant for years holds over his term, he is tenant at sufferance, and his descent shall not take away entry; but if tenant for term of another's life holds over his term, he is an intruder and his descent shall take away entry. Quod fuit concessum per Dyer. Ow. 35. Mich. 13 and 14 Eliz. Anoti.

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2. A.

S. P. seems admitted. Cro. E. 940. Hill. 45 Eliz. B. R. Per Cur. — Ow. 96. Per Coke Arg.

2. A. devised lands to B. and dies; a stranger enters and died seised before any entry by devisee, now is the devisee without remedy. Arg. 2 Le. 147. pl. 182. Trin. 30 Eliz.

3. There is a diversity between a right for the which the law gives a remedy by action, and a title, for the which the law gives no remedy by action but by entry only. The feoffee upon condition in this case has a right to the land, and therefore his entry may be taken away because he may recover his right by action. Co. Litt. 240. a.

4. But the feoffor or donor that have but a condition, their title cannot be taken away by any descent, because they have no remedy by action to recover the land, and therefore if a descent should take away their entry, it should bar them for ever; and the law is all one, whether the descent were before the condition broken or after. Co. Litt. 240. a.

5. Another reason wherefore a descent shall not take away the entry of him that has a title to enter by force of a condition, &c. is, for that the condition remains in the same essence that it was at the time of the creation of it, and cannot be divested or put out of possession, as lands and tenements may. Co. Litt. 240. b.

6. If a woman has title to enter causa matrimonii prælocuti no descent shall take away her entry; because she has but a title and no remedy by action. Co. Litt. 240. b.

7. If a disseisor makes gift in tail, the remainder in fee and the donee dies without issue, leaving his wife privement encient with a son. He in the remainder enters, and after the son is born, who enters into the land, this descent shall not take away the entry of the disseisee, because the issue comes not to the land immediately by descent after his father's decease. Co. Litt. 241. b.

But if the young'st son makes a feoffment in fee, and the feoffee dies seised, that descent shall take away the entry of the eldest, in respect that the privity of the blood fails. Co. Litt. 242. b.

8. If one dies seised in fee or in tail, and leaves two sons, and the younger, whether of the whole or half blood, abates and has issue and dies, yet the elder or his heir may enter, for it shall be intended, that the younger did not set up a new title, but that he claimed as heir to his father in the elder brother's absence, and that it was his intent to preserve the possession against strangers; and for this reason, one brother shall not have mortdancester against the other. And the law is the same if there be divers descents, or if the eldest brother enters into borough english land. Hawk. Co. Litt. 327.

If a man had issue bastard eigne, and mulier puisne, and the bastard in the life of the father has issue and dies, and then the father dies seised, and the son of the bastard enters as heir to his grandfather, and dies seised, this descent shall bind the mulier. Co. Litt. 244. b.

[600] 9. If the younger son of a man enters by abatement and dies seised, this does doth not toll the entry of his elder brother; but if the eldest son enters and is seised, and the younger brother disseises him, and dies seised, having issue, the elder brother cannot enter. Litt. S. 396, 397.

Posseſſio terræ muſt be vacua when the young'eſt ſon enters by abatement; therefore if after the deceaſe of the father a ſtranger firſt enters, and abates, upon whom the

youngest son enters, and disseises him, and dies seised; this descent shall bind the eldest, for he entered by disseisin, and not by abatement. Co. Litt. 242. b.

When a younger brother enters in this case, he does not enter to get a possession distinct from that of the elder brother, but to preserve the possessions of the father in the family, that nobody else abates. For since this is the most charitable interpretation that can be made of this action, and by such a construction it is just and rightful, the law shall not intend it to be a wrongful act or disseisin, and by consequence the possession of the younger brother becomes that of the elder brother, and then if there be not a possession distinct, and separated from the right, the descent cannot make a right possession distinct from the right of propriety; for it were incongruous that the ancestor should be construed to possess in another's right, in order to do no injury, and the heir should be construed to possess in his own right, in order to do injustice to the elder brother. Besides no laches can be imputed to the elder brother, since the younger entered and possessed for him. But if the younger brother in this case had made a feoffment in fee, and the feoffee had died seised, this descent had taken away the entry, because then the younger brother could not be interpreted to enter to preserve the estate of the elder, but in order to make the advantage of it for himself. So in this case Littleton put, If the elder brother had entered, then if the younger had entered upon him, this had been in destruction of the elder brother's possession, and therefore the younger gets a possession distinct from that of the elder brother, and his heir a distinct right of possession, and it is the laches of the elder brother, that he did not enter to restore his possession. Gilb. Treat. of Ten. 24, 25.

10. If a man has two daughters and dies, the eldest entereth into all the lands, claiming all to her, &c. and has issue and dies seised, and the issue enters, and dies, leaving issue, and such second issue enters, yet as to one moiety the youngest sister may enter; but if both sisters had been once seised, and the eldest disseised the youngest of her part, the youngest sister nor the heirs cannot enter. Litt. S. 398.

If one coparcener enters and claims the whole land and makes a feoffment in fee, and takes back an estate to

her and her heirs, and has issue, and dies seised, this descent shall take away the entry of the other sister, because by the feoffment, the privy of the coparcener was destroyed. Co. Litt. 243. b.

If one coparcener enters into the whole, it is only in preservation of the estate of the other; but if he disseises the other after her entry, there she gets a possession distinct from that of her sister and the descent will take away the entry, causa qua supra. Gib. Treat. of Ten. 26.

11. If after the decease of the father a stranger does first enter and abate, upon whom the youngest son enters and disseises him, and dies seised. This descent shall bind the eldest; for he entered by disseisin, and not by abatement. Co. Litt. 242. b.

12. If a man be seised of land in the nature of borough english, and has issue two sons and dies, and the eldest before any entry made by the youngest, enters into the land by abatement, and dies seised; this shall not take away the entry of the youngest brother. Et sic de similibus. Co. Litt. 242. b. 243. a.

13. Lands were given to the husband and wife, and to the heirs of their two bodies, they had issue daughters, the wife died, the husband had issue by another wife four sons, and died, the eldest son abated and died seised, this descent did take away the entry of the daughters, because they claimed not by one title. Co. Litt. 242. a. b.

14. If the father makes a lease for life, and has issue two sons and dies, and the tenant for life dies, and has issue two sons, and dies, and the tenant for life dies, and the youngest son intrudes, and dies seised, this descent shall not take away the entry of the eldest son. Co. Litt. 243. a.



